Supreme Court of the United States

OCTOBER TERM, 1962

No. ~~204~~ 24

HALLIBURTON OIL WELL CEMENTING COMPANY
Appellant

versus

JAMES S. REILY, COLLECTOR OF REVENUE, STATE OF LOUISIANA (Since Succeeded by Robert L. Roland, who Was Duly Succeeded by Roland Cocreham)

Appellee

On Appeal from the Supreme Court of the State of Louisiana

BRIEF OF AMICUS CURIAE, REPRESENTING ROSSON-RICHARDS PROCESSING COMPANY and WATE-KOTE COMPANY, LTD.

ROBERT E. LEAKE, JR.
1207 Whitney Building
New Orleans 12, Louisiana
Counsel of Record Upon Whom Service May Be Made

Of Counsel:
WARREN M. FARIS
FRANCIS C. EMMETT
CAMILLE A. CUTRONE
FARIS, LEAKE & EMMETT
1207 Whitney Bldg.
New Orleans 12, La.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 264

HALLIBURTON OIL WELL CEMENTING COMPANY
Appellant

versus

JAMES S. REILY, COLLECTOR OF REVENUE, STATE OF LOUISIANA (Since Succeeded by Robert L. Roland, who Was Duly Succeeded by Roland Cocreham)
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On Appeal from the Supreme Court of the State of Louisiana

BRIEF OF AMICUS CURIAE, REPRESENTING ROSSON-RICHARDS PROCESSING COMPANY and WATE-KOTE COMPANY, LTD.*

May it Please the Court:

THE QUESTION AT ISSUE

Does the levy by Louisiana of a use tax upon the cost of transportation in interstate commerce, while, at

* Consent of the parties to the filing of this brief has been obtained. See certificate of counsel, post.

the same time, and under the same statute, levying no tax upon the cost of transportation of an identical nature which occurs entirely within the borders of Louisiana, offend the interstate commerce clause of the federal constitution?

ROSSON-RICHARDS PROCESSING COMPANY, AND WATE-KOTE CO., LTD. HAVE AN ISSUE PARALLEL TO THAT NOW AT BAR

These two Texas corporations are engaged in business in many states, including Louisiana. Their operations play an important part in the construction of the extensive interstate pipeline systems which transport petroleum and petroleum products across the United States. Their place in this interstate transportation system is in the wrapping and coating of the iron pipe, a large portion of which is "laid" in Louisiana.

These taxpayers cover the pipe with a specially prepared aggregate material and wire mesh. The raw materials in question were produced in Illinois and Wyoming, where they were purchased by Rosson-Richards and Wate-Kote, who then transported them to Louisiana at their own risk for their own use.

These two Texas corporations have paid to Louisiana a use tax upon their entire purchase price for these materials, and the sole remaining issue between them and the Collector is whether they should be required to pay a use tax on the transportation charges incurred by them for moving these materials from Illinois and Wyoming to the Louisiana destination.

The Louisiana Sales and Use Tax Statute, Sec. 301 (3),[1] and the Louisiana Collector's regulatory interpretation thereunder[2] specifically provide that "cost price", which is the base for use tax calculation, shall include transportation charges incurred by the importer in "putting the finished product down in Louisiana."[3]

For the tax years in question (1958, 1959 and part of 1960), the Louisiana Collector demands a 2% use tax upon these interstate freight costs, as follows:

From Rosson-Richards	$24,126.90
From Wate-Kote Co., Ltd.	6,746.90
Total	$30,873.84

And, of course, these demands continue to accrue "from year to year."

If these taxpayers were to purchase their wire mesh and special concrete aggregate F.O.B. a Louisiana plant and then ship these materials within the State to the job-site, there would be a Louisiana sales tax upon the purchase price of the materials, but there would be no sales or use tax upon the purely "within-Louisiana" transportation costs incurred by taxpayers in shipping the materials. Such intrastate transportation charges, which form no part of the sales contract, are not taxed under the Louisiana Sales and Use Tax Statute, or sought to be taxed by the Collector. However, in this

[1] Jurisdictional Statement of Halliburton (Appendix B), p. 70.
[2] Ibid., pp. 11-12.
[3] *Ibid.*

case, because these two taxpayers buy their materials in Wyoming and Illinois, F.O.B. plant, and then bring them across state lines to the Louisiana job-site, the Louisiana Collector asserts his right to collect a 2% impost upon the cost of the entire movement both while out-of-state, and within the state.

The Louisiana Collector levies his tax upon interstate freight charges, while conceding the exemption from the same tax of the cost of purely intrastate transportation. And the movement within the state is sought to be taxed if it is part of an interstate movement.

It is respectfully submitted that this is a gross discrimination against interstate commerce in its classic form — transportation. If this court affords no relief, the Louisiana Collector will continue to enforce his two-per-cent penalty as an effective inducement to business concerns to make their purchases in Louisiana, rather than outside the state in interstate commerce. It is respectfully submitted that this method of taxation provides a "direct commercial advantage to local business," of the type prescribed by this court on numerous occasions. See particularly *Memphis Steam Laundry Cleaner, Inc. vs Stone*, 342 US 389, 96 L.Ed. 436, 72 S.Ct. 424 (1952), and the cases cited by the court in the *Stockham Valves* case. See "citations and quotations" in Jurisdictional Statement filed by Halliburton Oil Well Cementing Company, at pp. 22-23.

THE STATUS OF THESE TAXPAYERS' CLAIMS

The Louisiana Collector has demanded that the $30,873.84 be paid, but has recognized that the decision of this court in the *Halliburton* case could do much to settle these taxpayers' problems. Like many other taxpayers, Rosson-Richards and Wate-Kote have agreed with the Louisiana Collector that the deficiency demands against them shall be held in abeyance, upon waivers of the Statute of Limitations, pending the final action of this court in the *Halliburton* case. Thus, like many other taxpayers engaged in interstate commerce, these taxpayers await a decision of this court in the *Halliburton* case with deep interest.

THE ISSUE HERE IS SUBSTANTIAL

The Louisiana Collector frankly takes the position that he may levy a tax upon operations which occur wholly in interstate commerce, while simultaneously exempting the identical operations where they occur wholly within Louisiana's borders.

He contends that he is completely unhampered by the federal interstate commerce clause, so that:

1. He can tax the cost of "labor and shop overhead" when incurred outside Louisiana, while exempting such cost incurred within Louisiana;[4]

2. He can tax the cost of ships, vessels, and barges built outside Louisiana and then imported into the state, while exempting such ships, vessels and barges built in Louisiana shipyards;[5]

[4] See Jurisdictional Statement of Halliburton, p. 9, et seq.
[5] Ibid. p. 38, et seq. Brief, Amicus Curiae, filed by Thomas Jordan, Inc.

3. He can tax an "isolated sale" occurring outside Louisiana, while exempting an identical "isolated sale" which takes place within Louisiana's boundary lines;[6] and

4. He can tax the cost of interstate transportation from Wyoming and Illinois, to Louisiana, while simultaneously exempting from the same tax similar costs incurred in intrastate transportation inside Louisiana.

In the instant case, the Collector would add more than a million dollars to the tax base while admittedly he would not attempt to collect any tax upon intra-Louisiana freight costs.

CONGLUSION

It is submitted that this court should note jurisdiction in this case to lay at rest the many disputes which have arisen in this field between the Louisiana Collector and various taxpayers who are engaged in interstate commerce.

ROBERT E. LEAKE, JR.
1207 Whitney Building
New Orleans 12, Louisiana
Attorney for Rosson-Richards Processing Company and Wate-Kote Co., Ltd.

[6] See Jurisdictional Statement of Halliburton, p. 14, et seq.

CERTIFICATE OF CONSENT TO FILING OF AMICUS CURIAE BRIEF AND PROOF OF SERVICE

I, Robert E. Leake, Jr., a member of the bar of the Supreme Court of the United States, do hereby certify that consent has been granted by both parties to this cause to filing of a brief, amicus curiae, in this cause on behalf of Rosson-Richards Processing Company and Wate-Kote Co., Ltd., and I attach to this brief letters evidencing such consent.

I further certify that I have on September .... 1961 served copies of the foregoing brief upon the several parties herein, by mailing same in duly addressed envelopes, with first class (and in the case of Chicago Bridge & Iron Company, airmail), postage prepaid, to their respective attorneys of record, as follows:

1—To Honorable Chapman L. Sanford, attorney for Roland Cocreham, Collector of Revenue of the State of Louisiana (successor in office to James S. Reily and Robert L. Roland, prior parties herein) appellee herein, at his office in the Capitol Annex Building, Baton Rouge, Louisiana.

2—To Messrs. C. Vernon Porter and Benjamin B. Taylor, Jr., attorneys for Halliburton Oil Well Cementing Company, appellant herein, at their office at 1100 Louisiana National Bank Building, Baton Rouge, Louisiana.

3—To Cicero C. Sessions, Esq., attorney for Sperry Rand Corporation, amicus curiae herein, at his office

at 1333 National Bank of Commerce Building, New Orleans 12, Louisiana.

4—To Charles D. Marshall, Esq., attorneys for Thomas Jordan, Inc., amicus curiae herein, at his office at 1122 Whitney Building, New Orleans 12, Louisiana.

5—To Albert L. Hopkins, Esq., attorney for Chicago Bridge & Iron Company, amicus curiae herein, at his office at One North LaSalle Street, Chicago 2, Illinois.

ROBERT E. LEAKE, JR.
1207 Whitney Building
New Orleans 12, Louisiana
Attorney for Rosson-Richards Processing Company and Wate-Kote Co., Ltd. Amicus Curiae

LEGAL DIVISION

DEPARTMENT OF REVENUE
STATE OF LOUISIANA
BATON ROUGE 1

ROLAND COCREHAM
COLLECTOR OF REVENUE

September 5, 1961

Farris, Leake & Emmett
Attorneys at Law
1207 Whitney Building
New Orleans 12, Louisiana

Gentlemen:

Re: Halliburton Oil Well Cementing Co.
vs. La. Collector of Revenue
No. 264 in the Supreme Court of the
United States - October Term 1961

On behalf of the Louisiana Collector of Revenue consent is hereby granted that you may file a brief amicus curiae on behalf of Rosson-Richards Processing Co. and Wate-Kote Co., Ltd.

Very truly yours,

C. L. Sanford

Chapman L. Sanford
Attorney

CLS:jdf

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LAW OFFICES OF

TAYLOR, PORTER, BROOKS, FULLER & PHILLIPS

LOUISIANA NATIONAL BANK BUILDING

POST OFFICE DRAWER 2471
TELEPHONE DICKENS 8-3221

BATON ROUGE 2, LOUISIANA

September 5, 1961

Messrs. Faris, Leake & Emmett
1207 Whitney Building
New Orleans, 12, Louisiana

Re: Halliburton Oil Well Cementing Company
vs. Reily, Collector of Revenue
No. 264, October Term, 1961
Supreme Court of the United States

Gentlemen:

Consent is hereby granted for you to file a brief amicus curiae in this suit, on behalf of Rossen-Richards Processing Company and Wate-Kote Company, Limited.

Very truly yours,

TAYLOR, PORTER, BROOKS, FULLER & PHILLIPS

BY: B B Taylor Jr

BBTJr/mm

Attorney for Halliburton Oil Well Cementing Co. — Appellant

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

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HALLIBURTON OIL WELL CEMENTING COMPANY,
Appellant

versus

JAMES S. REILY, COLLECTOR OF REVENUE, STATE OF LOUISIANA (Since Succeeded by Robert L. Roland, Who Was Duly Succeeded by Roland Cocreham),
Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR THE APPELLANT

Robert O. Brown,
General Counsel for Appellant

Robert E. Rice,
Assistant General Counsel
Duncan, Oklahoma

Of Counsel:
Laurance W. Brooks
James R. Fuller
Charles W. Phillips
William G. Randolph
Frank W. Middleton, Jr.
Robert J. Vandaworker
Tom F. Phillips

Baton Rouge, Louisiana
November 19, 1961

C. Vernon Porter
and
Benjamin B. Taylor, Jr.

Taylor, Porter, Brooks, Fuller & Phillips, Attys.
1100 La. Nat'l Bank Bldg.
Baton Rouge, Louisiana

Counsel of Record, Upon Whom Service May Be Made

Franklin Press, Inc. Baton Rouge, La.

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IN THE

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Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR THE APPELLANT

May It Please the Court:

Halliburton Oil Well Cementing Company, of Duncan, Oklahoma, appeals from a decision of the Supreme Court of Louisiana, which upholds the Louisiana Collector of Revenue in his interpretation and administration of the Louisiana Use Tax. By order dated October 9, 1961, this Court noted probable jurisdiction of the case.[1]

[1] Printed Transcript of Record, p. 77.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Louisiana is reported at 241 La. 67, 127 So. 2d 502, and is reproduced at page 34, *et seq.*, of the printed Transcript of Record.

The opinion of the trial court, September 25, 1959, is not reported, but is found at p. 65, *et seq.*, of the Original Record.[1]

JURISDICTION

This is a suit for a refund of tax moneys paid under protest. The taxing statute in question is the Louisiana "Sales Tax,"[2] commonly called the "Sales and Use Tax." The suit for refund is specifically authorized by, and properly brought under, the provisions of Louisiana Revised Statutes 47:1576. This is uncontested.

Halliburton conducts interstate business operations, partially outside Louisiana, partially within Louisiana. Halliburton contended that the interstate nature of its operations ought not to give rise to any additional burden of Louisiana taxes; that it ought not be taxed any more heavily than if its operations were conducted wholly within Louisiana's border lines.

---

[1]The opinion of the Trial Court (19th Judicial District Court, Louisiana) is not reproduced in the printed record for the reason that it consists of a short introduction followed by this language:

> "Counsel for plaintiff [appellant here] has filed . . . an exhaustive written brief. . . . This brief discusses quite clearly and fully the facts . . . and the law. . . . *I agree with counsel's arguments and adopt his brief in full as my reasons for judgment herein.* I . . . attach his brief hereto as if fully written herein." (Original Record, p. 67)

As may be noted from the Original Record, the reasoning in the Trial Court brief, thus rendered into "reasons for judgment," is essentially the same as that set forth in this brief.

[2]La. R.S. 47:301, *et seq.* See Appendix "A," p. 74, *infra*.

The Louisiana Supreme Court held that the Louisiana Collector could discriminate against Halliburton, and tax it more heavily, as compared to the tax burden which would fall upon Halliburton (or a competitor of Halliburton) if the business operations did not cross state lines; that Louisiana may thus levy an **excise** tax upon the privilege of moving goods in interstate commerce.

The issue is whether or not such frankly discriminatory taxation is offensive to the Constitution of the United States, including particularly the Interstate Commerce Clause (Article I, Sec. 8, Clause 3), and or the Fourteenth Amendment. The trial court held that the discriminatory excise tax was a burden upon interstate commerce, which was violative of the Federal Constitution, and that the heavier excise tax (falling solely upon the taxpayer who brought his goods into Louisiana, across the state line) was also a denial of due process and of the protection of the laws, guaranteed by the Fourteenth Amendment of the Federal Constitution. The Louisiana Supreme Court reversed and held that Louisiana may collect the heavier excise tax from the individual who uses chattels moved into Louisiana from outside the state, while exempting from the same tax burden the individual who uses chattels produced in Louisiana, and which thus lack the element of interstate transportation.

The Supreme Court of the State of Louisiana initially rendered its decision on the 15th day of February, 1961. Application for Rehearing was timely filed by present appellant, on the 27th day of February, 1961, and said Application for Rehearing suspended the finality of the decision of the Louisiana Supreme Court until that court denied the Application for Rehearing, on the 20th day of March, 1961, at eleven

o'clock a.m. (Louisiana Code of Civil Procedure, Articles 2166-2167).

Notice of Appeal to the Supreme Court of the United States was timely filed by appellant, in the Supreme Court of the State of Louisiana, on the 2nd day of June, 1961.

The jurisdiction of the Supreme Court of the United States to review this decision by appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court of the United States to review the judgment of the Louisiana court, on direct appeal, in this case: *Henneford v. Silas Mason Company*, 300 U. S. 577, 57 S. Ct. 524, 81 L. Ed. 814 (1936); *Northwestern States Portland Cement Company v. Minnesota*, 358 U. S. 450, 79 S. Ct. 357, 3 L. Ed. 2d 421, 67 ALR 2d 1292 (1959); *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U. S. 389, 72 S. Ct. 424, 96 L. Ed. 436 (1952); *Nippert v. City of Richmond*, 327 U. S. 416, 66 St. Ct. 586, 90 L. Ed. 760, 162 ALR 844 (1946); *Freeman v. Hewitt*, 329 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 265 (1946).

QUESTIONS PRESENTED

The issue in this case arises within the following framework:

1. The Louisiana "sales tax" (as distinguished from the "use tax"), like the sales tax of other states, is levied only upon transactions which occur within the borders of the state, i.e., only upon intrastate transactions.

2. It was found (in Louisiana and elsewhere) that such sales taxes, falling only upon the intrastate transactions,

tended to drive business out of the state. People would go outside the state for their major purchases, thus avoiding the intrastate **sales tax.**

3. Accordingly "compensating" **Use Tax** statutes were enacted **to prevent such discrimination** against local merchants. The use tax falls solely upon the use, within the state, of goods acquired outside the state and then brought into the state across the interstate borderline. The Use Tax was designed to prevent discrimination against intrastate transactions. In Louisiana, the two taxes were combined into one statute known as "The Sales and Use Tax" Statute (La. R.S. 47:301, et seq.). Appendix "A," *infra*, p. 74.

The Louisiana Supreme Court has said this:

> "As a device for supplementing or complementing the sales tax, resort has been made to use or compensating taxes. A use tax is an integrated part of a sales tax, one of its purposes being to prevent purchases of tangible personal property outside . . . [the jurisdiction] . . . in an effort to escape the payment of the tax on local sales . . . ."
>
> *Chrysler Corp. v. City of New Orleans*, 238 La. 123, 114 So. 2d 579, at 581 (1959).

4. Since the Use Tax falls only upon the situation in which there has been an **interstate** movement of goods, such a statute was quickly attacked as repugnant to the interstate commerce clause of the Federal Constitution. This attack was made, in 1936, by the Silas Mason Company which had brought heavy earth-moving equipment into the State of Washington, to construct the Grand Coulee dam.

5. The Use Tax was upheld by this court, as constitu-

tional, although it fell only upon activities involving interstate movement because (in the case then at issue) it did not exceed the comparable sales tax of the same state and was merely complementary to the sales tax and precisely equal to the sales tax, and—therefore—the use tax did not "discriminate" against the interstate transactions. *Henneford v. Silas Mason Company,* 300 U. S. 577, 57 S. Ct. 524, 81 L. Ed. 814 (1936).

6. In a case, however, where the use tax of a state, falling solely on **interstate** transactions, levies a burden which is more onerous than the sales tax, falling on comparable intrastate transactions, then the use tax loses the fiat of the *Henneford* decision, and is unconstitutional because it does discriminate against the transactions which are in interstate commerce. This is the essential position of appellant taxpayer.

7. It is to be noted that the Louisiana Sales and Use Tax is an **excise** tax levied upon the privilege of performing an act. *Mouledoux v. Maestri,* 197 Lo. 525, 2 So. 2d 11 (1941). See also *Brandtgen & Kluge v. Fincher,* 111 P. 2d 979, 980, 44 Cal. App. Supp. 939, and Words & Phrases, Vol. 15 (a), p. 171, verbo "Excise."

* * *

The issue here is whether or not the State of Louisiana (through its Collector of Revenue) may openly and avowedly discriminate against the taxpayer whose operations cross interstate border lines, and in favor of the competing taxpayer who operates wholly within Louisiana boundaries.

The Louisiana Supreme Court has held that the Louisiana **Use** Tax may be designed and enforced so as to place a heavier excise tax burden upon interstate operations than the

excise tax burden of the **Sales** Tax which falls upon comparable intrastate operations. The decision is tantamount to a holding that Louisiana may erect a wall of taxes at the state line. The incidence of the additional excise tax burden falls upon the act of crossing the state border line.

• • •

Thus, the following questions are presented by this appeal:

1. Whether or not the State of Louisiana, through its Collector of Revenue, may apply an excise tax, the Louisiana Sales and Use Tax, so that the burden thereof bears more heavily upon a taxpayer who comes into Louisiana from outside the state than the burden of the same tax statute would bear upon a Louisiana resident engaged in precisely the same economic activity as that of the more heavily taxed non-resident.

2. Whether or not the Supreme Court of the State of Louisiana may constitutionally render a judgment which specifically approves and authorizes the State of Louisiana to discriminate against non-residents of Louisiana, doing business in Louisiana, and in favor of residents of Louisiana, by inflicting a discriminatory excise tax upon the non-residents, which is heavier than the comparable excise tax burden which falls upon Louisiana residents engaged in precisely the same activity.

3. Whether or not the State of Louisiana may tax (via its Sales and Use Tax) the non-resident ("the stranger from afar") more heavily than it would tax a resident Louisiana citizen engaged in the same identical business operation, in view of the fact that the Supreme Court of the United States has held that:

"The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."

Best & Co. v. Maxwell, 311 U. S. 454, 61 S. Ct. 335, 85 L. Ed. 275 (1940).

4. Whether or not the State of Louisiana may give separate and unequal treatment to the business man who brings his goods across state lines (taxing him more heavily than it would tax his intrastate competitor), in view of the requirement set up by the Supreme Court of the United States, in *Henneford v. Silas Mason Company*, 300 U. S. 57, 57 S. Ct. 524, 81 L. Ed. 814 (1937), for a valid state use tax, as follows:

"Equality is the theme that runs through all sections of the statute. . . .

"When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed. . . ."

* * *

"In each situation the burden borne by the owner is balanced by an equal burden where the sale is strictly local. . . ."

5. Whether or not the Louisiana Sales and Use Tax Statute, as applied by the Louisiana Collector of Revenue so as to tax non-residents[1] more heavily than he would apply and

[1] Of course, the heavier excise tax would also fall on a Louisiana resident who chose to conduct the production part of his operations in another state, and then moved his chattels into Louisiana, for use. It is the multi-state operation and interstate movement which gives rise to the additional tax.

levy the same excise tax upon Louisiana residents, is offensive to and repugnant to and violative of the Constitution of the United States, including but not limited to the following clauses thereof:

a. **The Interstate Commerce Clause**, being Article I, Section 8, Clause 3, of the Constitution of the United States;

b. **The Due Process Clause**, being a portion of the Fourteenth Amendment to the Constitution of the United States;

c. **The Equal Protection of the Laws Clause**, being a portion of the Fourteenth Amendment to the Constitution of the United States;

it being the principal contention of Halliburton Oil Well Cementing Company (taxpayer herein) that the discriminatory excise tax burden, of which complaint is made, does fall upon persons who conduct a part of their operations outside the State of Louisiana and then cross the state line into Louisiana, whereas, said excise tax burden does not fall upon persons who conduct identical operations entirely within the interstate border line of the State of Louisiana, and said taxpayer contends that such discriminatory taxation directly infringes upon the right of regulation of interstate commerce, vested in the Federal Congress, for the reason, among others, that it is an attempt by the State of Louisiana to lay an excise tax on the privilege of engaging in interstate commerce and upon the carrying on of a business in interstate commerce; that the tax statute is arbitrary and discriminatory in violation of the Fourteenth Amendment; that the taxing statute, therefore, is not valid.

CONSTITUTIONAL PROVISIONS AND STATUTES

The familiar "interstate commerce" clause of Section 8, of the Constitution of the United States, is as follows:

> **"Section 8, Clause 1. Powers of Congress; levy of taxes for common defense and general welfare; uniformity of taxation**
>
> "The Congress shall have the Power . . .
>
> **"Section 8, Clause 3. Regulation of commerce**
>
> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

The pertinent portions of the Fourteenth Amendment to the Constitution of the United States, containing the "due process" clause and the "equal protection of the laws" clause, are as follows:

> "AMENDMENT XIV. Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Louisiana taxing statute, the validity of which is attacked, is the Louisiana Sales and Use Tax, Louisiana Revised Statutes of 1950, Title 47, Sections 301-318. A copy of the pertinent provisions of that statute is attached hereto, as Appendix "A," *infra*, p. 74.

The appellant taxpayer, Halliburton, quotes the following policy statement from the Louisiana statute:

> "RS 47:305—It is not the intention of this Chapter

to levy a tax upon articles of personal property imported into this state, . . . ; nor is it the intention of this Chapter to levy a tax on bona fide interstate commerce . . . ."

And the taxpayer quotes the Louisiana Collector's own Sales and Use Tax Regulation, Art. 2-3.[1]

> **"Generally, it may be said that the Use Tax applies to the use of property in this State, the sale of which would be subject to tax had there been a purchase within this State.** The Use Tax does not apply upon the use of any property which has been subjected to a sales tax in another State at a rate equal to or greater than the rate of tax imposed by the Louisiana General Sales Tax, **nor does the Use Tax apply upon the use of any property which is exempt from the tax imposed upon the sale at retail by the Louisiana General Sales Tax Act. The two taxes, Sales and Use, stand as complements to each other and taken together provide a uniform tax upon either the sale at retail or use of all tangible personal property irrespective of where it may have been purchased."** (CCH State and Local Tax Reporter, Louisiana, Volume 1, Section 60-101(a). Emphasis supplied)

STATEMENT OF THE CASE

There is but one issue of law here—whether state taxation may discriminate against the multi-state business operation and in favor of local intrastate business.

But this issue arises upon two different sets of operative facts. These two situations will be discussed under two headings:

"First: The Labor and Shop Overhead Phase,"

"Second: The Isolated Sales Phase."

[1] Effective May 1, 1961, this Regulation was revised, but—of course—such revision is without operative effect here.

Initially there was a third phase, entitled *"The Cost v. Depreciated Value Phase,"* but this third phase has been resolved and is not now at issue.

The case was submitted upon a Stipulation of Facts,[1] and upon the admitted allegations of the first eight paragraphs of the petition,[2] to which stipulation and admissions this Court is respectfully referred.

First: **"The Labor and Shop Overhead Phase"**

The question here is whether or not Louisiana may include the labor-and-shop-overhead element of cost in the tax base of the interstate operator while excluding this element of cost from the tax base of his intra-state competitor.

In its shops at Duncan, Oklahoma, appellant Halliburton produces and fabricates complex truck-borne oil-well servicing equipment which it uses in Louisiana. See Photographs Annex 8 and Annex 9 to the original Petition (Record, 17 and 19). Halliburton uses this type of equipment in Louisiana, under contract, but does not sell the equipment. It is a significant operative fact that Halliburton is a producer using its own product, sometimes called a "manufacturer-user," or "producer-consumer."

When Halliburton brought the fabricated equipment into Louisiana, it paid a use tax upon the cost to it of the tangible physical properties incorporated into the equipment. Louisiana now demands, additionally, a 2% use tax upon the labor

[1] Printed Transcript of Record, p. 22, *et seq.*
[2] *Ibid.*, pp. 2-6.

and shop overhead expended in assembling and producing the finished item.

If Halliburton had its shops in Louisiana, instead of in Oklahoma, a sales tax would fall upon its operations (i.e., the production and use of an item of equipment) as follows: (1) a sales tax would fall upon the purchase price of the truck chassis when it was purchased by Halliburton and (2) a sales tax would fall upon the purchase price of each item of physical equipment (e.g., motors, pipes, gauges, metal, gaskets, etc.) which was purchased by Halliburton for incorporation into the finished product item. But, of course, there would be no sales tax whatsoever, and no use tax whatsoever upon the "labor and shop overhead" which went into the assembly operation, which transformed the raw truck chassis and the other raw metal parts into the complex finished item. This is incontestible and uncontested.

The Collector has stipulated that his position is discriminatory:

> "If Halliburton had purchased its materials, operated its shops, and incurred its Labor and Shop Overhead expenses at a location within the State of Louisiana, there would have been a sales tax due to the State of Louisiana upon the cost of the materials purchased in Louisiana and a Use Tax on materials purchased outside of Louisiana; but there would have been no Louisiana sales tax or use tax due upon the Labor and Shop Overhead." (Stipulation—Par. IV. Record, pp. 26-27)

Nevertheless, says the Collector, because Halliburton has its shops in Oklahoma, and not in Louisiana, an additional 2% tax must be paid. Because Halliburton operates its construction shops in Oklahoma and not in Louisiana, the Collec-

tor would demand a penalty excise tax measured by 2% of the "labor and shop overhead" expended by Halliburton, in its Duncan, Oklahoma, shops.

The Collector's Ruling:

The Collector has accorded his discriminatory position the status of a regulation in an open letter, directed to Commerce Clearing House Tax Service, under date of October 10, 1956, reported in CCH Louisiana State Tax Service, Par. 200-115, viz.,

> "(§ 200-115) Letter from Legal Division, Department of Revenue, October 10, 1956.
>
> **"Sales and use tax—Cost basis of direct labor and overhead charges.**
>
> "The cost basis with regard to direct labor and overhead charges where supply items are purchased at retail outside of Louisiana and manufactured, fabricated and assembled **outside of Louisiana** into a finished product which is brought into the state for use solely by the fabricator is the cost to the fabricator of putting the finished product down in Louisiana. This cost includes all cost of acquiring the materials, fabrication and assembly, labor overhead, transportation and other incidental costs.
>
> "See § 60-101-a."
>
> **Question submitted by CCH.**
>
> "What is the cost basis for Louisiana Sales or Use Tax purposes with regard to direct labor and overhead charges where supply items are purchased at retail **outside of Louisiana** and manufactured, fabricated and assembled **outside of Louisiana** into a finished product which is brought into Louisiana for use solely by the fabricator and not manufactured, held or offered for resale?"

Answer [By the Collector]

"Louisiana Revised Statutes of 1950, Title 47, Section 302, levies a tax upon the use of each item of tangible personal property in the State at the rate of two per centum (2%) of the 'cost price' of each such item.

" 'Cost price', according to Section 301 of Title 47, Louisiana Revised Statutes of 1950 'means the **actual cost** of the articles of tangible personal property without any deductions therefrom on account of the cost of materials used, **labor or service cost, transportation charges** or any other expenses whatsoever.'

"In accordance with these provisions of the law, the basis for the Use Tax in Louisiana, under the circumstances enumerated in your question, is the cost to the fabricator of putting the finished product down in Louisiana. **This cost would include all costs** of acquiring the materials used, fabrication and assembly, **labor, overhead, transportation, and any other costs incident thereto.**"

The companion letter, from the Louisiana Collector, to CCH, showing that no use tax is due on labor and shop overhead, where ". . . supply items are . . . manufactured, fabricated and assembled **in Louisiana** for use solely by the purchaser . . ." is reproduced as Annex "B" hereto.[1] It is not reproduced here because the Collector has stipulated on this point.

The Unconstitutionality:

Halliburton is a manufacturer which uses (but does not sell) its own work product. It is a "manufacturer-user," sometimes called a "producer-consumer."

[1] *Infra*, p. 83. This letter is reported in CCH Louisiana State Tax Service Par 200-114.

In its totality, Halliburton's business operation here at issue is a **production-followed-by-a-use.** The production occurs in Oklahoma. Then the elemen of interstate transportation (to Louisiana) occurs. Then the property is used, by Halliburton, in Louisiana, to perform its oil well servicing contracts.

If the production-followed-by-a-use were wholly intrastate, there would be neither a sales tax, nor a use tax, on the cost of the labor-and-shop-overhead. This is stipulated. Where, however, the operation is multi-state in nature (with production in Oklahoma, and interstate transportation to Louisiana), the Louisiana Collector demands his two per cent of the cost of labor-and-shop-overhead, under the Louisiana Sales and Use Tax statute. There is no scintilla of fact which distinguishes the non-taxable (intrastate) operation from the interstate operation (which the Collector would tax) except the single simple fact that in the latter situation there exists the element of multi-state operation and interstate movement of goods. It is upon this element (interstate commerce) that the Louisiana Collector fixes the incidence of his tax.

The Louisiana Use Tax is fixed at 2% of "cost price" (Sec. 302(A) (2)[1] and "cost price" is defined as including "labor" (Sec. 301(3)).[2] The Collector (sustained by the Louisiana

[1] See Appendix "A," *infra*, p. 80.

[2] See Appendix "A," *infra*, p. 76. The statute provides:

"'**Cost price**' means the actual cost . . . without any deduction . . . on account of the cost of materials used, labor or service cost, transportation charges, or any other expenses whatsoever."

We submit that this simply means that a purchaser **cannot deduct** any portion of what he actually pays for an article. This should not mean that out-of-state taxpayers must **add** their own labor to the tax base, particularly since intra-state taxpayers do not add their own labor to their tax base.

Supreme Court) therefore includes labor and shop overhead in the base of the "Use Tax," while excluding it from the base of the "Sales Tax." Thus, the discrimination against the transaction which involves the interstate movement.

Obviously, the Collector would tax the Labor and Shop Overhead for the sole and only reason that it took place outside Louisiana. Halliburton contends that this is discrimination of the clearest and most elementary type.[1]

Halliburton concedes that (as an out-of-state "manufacturer-user") it brings these complex and vastly useful pieces of equipment into Louisiana, where they serve the Louisiana oil producers. And, Halliburton is quite willing to pay to the State of Louisiana a Use Tax in exactly the same sum as the Sales Tax would be; upon a comparable operation (by an intrastate "manufacturer-user") in Louisiana. But, says Halliburton, "No penalty should be levied upon us merely because we have our shops in Oklahoma and not in Louisiana." And Halliburton adds, "There should be no collection of toll at the Louisiana State line."

It is unequivocally clear that, if Halliburton operated entirely in Louisiana, and had its shops in Louisiana, there would be neither any sales tax, nor any use tax, upon the "labor and shop overhead" element which it put into its finished products. Halliburton respectfully submits that there should be no increase in its Louisiana tax burden, simply because it first creates its products in Oklahoma, and then moves them across the state line into Louisiana, where it uses them to serve Louisiana oil operators.

[1] Note the statutory disvowal of intent to tax interstate commerce. Sec. 305, at p. 81, *infra*.

Halliburton contends that such a tax, based solely upon the movement of goods in interstate commerce, is discriminatory and is an unconstitutional burden upon interstate commerce.[1]

Second: **"The Isolated Sales Phase'**

The question here is whether or not the Use Tax (which falls solely upon interstate transactions) may be collected, constitutionally, upon a type of transaction which would be exempt from the Sales Tax if the transaction were wholly intrastate. Can the additional element of multi-state operations and interstate movement of goods give rise to additional Louisiana taxes?

The Louisiana Sales Tax Statute (R.S. 47:301(10))[2] provides specifically that:

> ". . . nor [shall the terms 'sale at retail'] include an isolated or occasional sale of tangible personal property by a person not engaged in such business."

The Louisiana Department of Revenue Sales Tax Regulations provide:

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[1] The components used by Halliburton, in Oklahoma, to fabricate their equipment, were exempt from the Oklahoma Sales Tax because the production was for export. However, let us suppose, hypothetically, that a 2% Oklahoma Sales Tax had been paid, by Halliburton, on the cost of the component parts. The Louisiana statute would credit Halliburton with the 2% tax paid to Oklahoma upon the tangible physical properties incorporated in the finished items of equipment. (Sec. 305, *infra*, p. 82.) Louisiana would still demand a 2% use tax on the labor and shop overhead expended in assembling the finished item. This intangible element of "cost price" would be taxed (by Louisiana) if incurred in Oklahoma. It would not be taxed if incurred in Louisiana.

[2] Appendix "A," *infra*, p. 78.

"Art. 2-33 Casual and Isolated Sales—

"The tax does not apply to casual and isolated sales by persons not engaged in the business of selling such tangible personal property. . . ."

It is clear, therefore, that a "casual and isolated sale by a person not engaged in the business of selling . . ." the type of property at issue, is completely exempted from the Louisiana Sales Tax. This is uncontested.

The Collector of Revenue contends, and the Louisiana Court has held, that the Louisiana statute and regulations cannot be construed to grant a comparable "isolated sales" exemption in the case of the use tax. The Collector concedes that an "isolated or casual" sale made in Louisiana is exempted from the Louisiana sales tax. The Collector contends, however, that the use tax as levied by the taxing statute, properly falls upon the use, in Louisiana, of property which was acquired through an "isolated or casual sale" made in another state.

The issue is squarely raised here. Halliburton purchased certain oil field equipment from Spartan Tool and Service Company of Houston, Texas, when that concern went out of business. And purchased an airplane from the "Western Newspaper Union, of New York." It is stipulated that neither of these vendors was in the business of selling such equipment. It is stipulated that such sales were 'casual, occasional and isolated sales. . . ." (Stipulation of Facts, Par. VI, R. 29)

It is completely clear that if these "isolated sales" transactions had taken place within the borders of Louisiana, no

sales tax would have fallen upon the transaction. Nor would any use tax have been incurred by anybody. This is stipulated.

We quote from Par. VI. of the Stipulation of Facts:

> "It is further stipulated that the entire . . . [purchase price] . . . would not have been subject to the Louisiana Sales Tax or Louisiana Use Tax had the purchase of such equipment been made within the State of Louisiana." (R. 30)

The Collector's position, therefore, is that because these isolated sales occurred outside of Louisiana, the taxpayer must pay a two per cent "use" tax, that would not fall upon the use of the properties if the transactions had occurred in Louisiana. It is clear that this use tax is demanded by the Collector solely because the isolated sales transactions occurred outside Louisiana and the goods thereafter were brought across the state line. Thus, the Collector concedes that, but for this element of interstate transportation, he would not be demanding this tax money at all.[1]

Suppose Halliburton had taken delivery of the newspaper company's airplane at the Moisant Airport, in New Orleans, so that the sale was a Louisiana transaction. Obviously—no sales tax on this "isolated sale transaction." In the present case, the state demands the 2% use tax solely because the "isolated sale transactions" took place outside Louisiana and, thereafter, the airplane, etc., were transported, in interstate commerce, across the Louisiana state border line.

[1] Note that the Louisiana Collector would levy a tax penalty upon purchasers who do not confine themselves to the Louisiana *market-place*.

Each of the transactions at issue, viewed in its entirety, amounted to a purchase-followed-by-a-use. The purchases occurred outside Louisiana. Then the element of interstate transportation (to Louisiana) occurred. Then the properties were used, by Halliburton, in Louisiana, to perform its oil well servicing contracts.

If the entire operation (purchase-and-use) were wholly intrastate, there would be neither a sales tax, nor a use tax. This is stipulated. Where, however, the operation is multi-state in nature, with purchase outside Louisiana and interstate transportation to Louisiana, the Louisiana Collector demands his two per cent under the Louisiana Sales and Use Tax Statute. The distinguishing element, which generates the additional tax—so argues the Collector—is the multi-state nature of the operation and the interstate movement of goods. There is no other distinction.

In effect, the Louisiana Collector would employ the 2% use tax as an import tax. He would levy it only where the "isolated" purchase is made outside Louisiana. He would thus create a 2% inducement to make such purchases within Louisiana. He would give a direct commercial advantage to Louisiana vendors. He would directly discriminate against the out-of-state vendor. He would penalize Halliburton for going beyond the Louisiana market-place.

The taxpayer's contention that this discriminatory result is unconstitutional is precisely upheld in *State v. Bay Towing and Dredging Company, Inc.*, 265 Ala. 282, 90 So. 2d 743 (Alabama, S. Ct., 1956). See discussion, *infra*, p. 42.

How Federal Questions Were Presented:

There is no issue in this case other than whether or not the Louisiana taxing statute, as construed by the Louisiana Collector and the Louisiana Supreme Court, is offensive to the Federal Constitution. The issue was raised in the initial pleadings filed, and throughout all phases of the case.

The following is quoted from the original petition[1] filed by Halliburton:

"XI.

"As to each of the aforesaid three phases of this case, the taxpayer alleges—inter alia—that the Use Tax, if interpreted and applied as the Collector would interpret and apply it here would cast upon the taxpayer (petitioner) a burden more onerous than that which would be levied by the Louisiana Sales and Use Tax had the transactions involved occurred in Louisiana; that a state Use Tax may be upheld as reasonable, legal and constitutional only insofar as the burden thereof is equal to, and not in excess of the burden of the Sales Tax of that same state, to which Sales Tax said Use Tax is complementary. And the taxpayer further alleges that:

"A. The assessment proposed by the Collector, insofar as it results in a greater use tax liability than would be imposed under the sales tax if the transactions had taken place in Louisiana, is contrary to the terms and wording of the Louisiana taxing statute, as well as contrary to the intent and purposes of the Louisiana Legislature in enacting the taxing statute; and

[1] The initial pleading, R. 7, *et seq.*

"B. The practical effect of the Collector's proposed assessment is to subject goods moving [in] interstate commerce to a greater tax liability than would be imposed in the same situation, if all of the operative facts had occurred within the State of Louisiana, and therefore, the taxing statute, (if interpreted and applied as the Collector would interpret and apply it here) would amount to a discrimination against interstate commerce prohibited by the Commerce Clause of the United States Constitution; and

"C. The interpretation and application of the Louisiana Use Tax Statute, as proposed here by the Collector, is so unreasonable, arbitrary and capricious, and is so without regard to the true facts, and the economic realities of the factual situations as to amount to a denial of due process of law within the meaning of the 'due process' clause of the United States Constitution.

"XII.

"Regulation of interstate commerce is a function explicitly reserved to the Congress of the United States by virtue of the Constitution of the United States and particularly Article I, Section 8, Clause 3 thereof, and the tax here demanded and contended for by the Collector of Revenue of Louisiana directly infringes on that right of regulation vested in the Federal Congress, for the reason, among others, that [it] is an attempt by the State of Louisiana to lay a tax on the privilege of engaging in interstate commerce and upon the carrying on of the business of interstate commerce.

"XIII.

"Petitioner alleges that it would be deprived of its property without due process of law contrary to the pro-

tection and guaranty granted under the Constitution of the United States and particularly under the Fourteenth Amendment thereof and under Article I, Section 2, of the Constitution of the State of Louisiana should it be required to pay said taxes and the refund herein claimed be denied to it."

That the federal constitutional question was at issue throughout the case is made plain by the following language from the opinion of the Louisiana Supreme Court:

"Halliburton brought suit for a return of the amount in dispute, supra, alleging that the Use Tax, if interpreted and applied as the Collector would interpret and apply it to Halliburton, would cast upon the taxpayer (Halliburton) a burden more onerous than that which would be levied by the Louisiana Sales and Use Tax had the transactions involved occurred in Louisiana; and, that a state Use Tax may be upheld as reasonable, legal and constitutional, only insofar as the burden thereof is equal to and not in excess of the burden of the Sales Tax of that same state, to which Sales Tax said Use Tax is complementary. Plaintiff further alleged that the tax demanded of it infringed upon the right of regulation of interstate commerce by Congress (Article I, Section 8, Clause 3, Constitution of the United States), in that it was an attempt by the State of Louisiana to lay a tax on the privilege of engaging in interstate commerce and upon the carrying on of the business of interstate commerce. It still further alleged that it would be deprived of its property without due process of law, contrary to the protection and guaranty granted under the Constitution of the United States and particularly under the Fourteenth Amendment thereof and under Article I, Section 2, of the Constitution of the State of Louisiana, should it be required to pay the tax assessed.

"The trial court agreed with plaintiff and rendered judgment in its favor after trial. . . ."

• • •

"We conclude that under the rulings of the above authorities the 'use tax' as applied to plaintiff does not infringe upon the regulation of interstate commerce by Congress."

• • •

"Plaintiff endeavors to set forth the alleged inequality of the use tax as applied to it by arguing that if a local oil well servicing company had manufactured its own equipment in Louisiana it would only have had to pay a sales tax on the component parts employed, whereas plaintiff has been assessed a use tax not only on the component parts but also on the cost of labor and shop overhead. Plaintiff argues, as set forth, supra, that its burden, as compared to that of a local taxpayer, is so unequal as to constitute a violation of the 14th Amendment to the United States Constitution and of Article I, Section 2, of the Constitution of Louisiana."

• • •

" 'What does "equal protection of the laws" mean as applied to taxation? Equal protection cannot be said to be denied by a statute which operates alike on all persons and property similarly situated, or by proceedings for the assessment and collection of taxes which follow the course customarily pursued in the state.' "

• • •

"We do not find that the Louisiana Use Tax treats any person differently from any other person in a like circumstance. All users are subjected to the same rate

of tax: there is no arbitrary or unreasonable distinction. The law contains no hostility nor discrimination; it singles out no class of persons as subjects for its assessment.

"We do not find that the use tax as herein applied imposes an unconstitutional burden on plaintiff."

* * * *

". . . plaintiff relies on the case of *State of Alabama v. Bay Towing & Dredging Company, Inc.*, 90 So. 2d 743, wherein the Supreme Court of Alabama stated:

" 'As we see it, if the use tax act is construed as imposing a tax on the use in this state of tangible personal property purchased outside the state in casual and isolated sales transactions, such tax would constitute an unlawful discrimination against interstate commerce, contrary to the Commerce Clause of the United States Constitution, Const. art. 1, sec. 8, cl. 3, since no similar or equivalent tax burden is imposed in connection with the purchase of such property in casual and isolated sales transactions within the state. . . .'

"We might say at the outset that we do not feel constrained to follow the Alabama case, supra, because we find that the instant matter does not involve a question of interstate commerce."

* * * *

". . . we find no discrimination nor deprivation of property without due process of law. . . ." (Record, at p. 34 *et seq.*)

Thus, the federal constitutional issues relating to

1. The Interstate Commerce Clause;

2. The Due Process Clause; and

3. The Equal Protection of the Laws Clause

were the sole questions in this case. These questions were squarely raised in the original pleadings and were actively at issue throughout. The trial court held that the Louisiana tax statute was invalid, as offensive to the United States Constitution under all three clauses, and granted the refund sought ($43,325.63). The Louisiana Supreme Court reversed and upheld the Louisiana tax statute as valid, finding that it does not offend any constitutional rights of the taxpayer. From this latter ruling, Halliburton has appealed to this Court.

SUMMARY OF ARGUMENT

The Louisiana Collector of Revenue has boldly taken the position that Louisiana may levy an excise tax upon the privilege of engaging in interstate commerce.

The Louisiana Sales Tax (2%) falls only upon transactions which occur wholly within Louisiana's borders.

The Louisiana Use Tax (2%) is levied upon the use, in Louisiana, of tangible personal property acquired outside the state and brought into the state, across the state line, and used in Louisiana.

The "compensating use tax" was found necessary (in Louisiana and elsewhere) in order to prevent citizens of the state from going outside the state to make their major purchases, thus avoiding the sales tax levied on intrastate sales. The use tax, complementary to the sales tax, was designed to prevent tax discrimination against **intra**state business.

Although such a Use Tax falls only upon transactions in which the element of interstate commerce is involved, this type of tax has been upheld as constitutional and as inoffensive to the commerce clause, the due process clause, and the equal protection clause of the Federal Constitution, **because** —in the case then at bar—the use tax was precisely equal to (and did not exceed) the sales tax of the same state, to which the use tax was complementary. *Henneford v. Silas Mason Company*, 300 U.S. 577, 57 S.Ct. 524, 81 L. Ed. 814 (1936). The use tax was thus upheld **because**, in the *Henneford* case, the use tax **did not discriminate** against the interstate transaction.

It is appellant's position that, in any case where the (interstate) **use tax** burden is heavier than the (intrastate) **sales tax** burden would be (in a case identical except for the element of interstate movement), then the use tax **does discriminate** against the interstate transaction and, because of such discrimination, is violative of the Federal Constitution.

Appellant submits that, where the application and interpretation of the Louisiana Sales and Use Tax Statute is such that the Louisiana Collector may levy a burden of the tax only upon those who come into Louisiana from other states, thus giving a direct commercial advantage to local business, then said application of the statute offends the Federal Constitution.

Restated: Where the multi-state operator, who moves his goods across state lines, is subjected to a greater tax burden than that of his intrastate competitor (in precisely the same business operation), then said tax burden is a direct interference with the free flow of commerce between the

states, and is a tax upon the privilege of engaging in commerce which crosses state lines. Such a tax is unconstitutional.

How the Issue Arises:

Discrimination against the out-of-state operator, and in favor of his intrastate competitor, arises here on two sets of operative facts. In each situation it is important to remember that Halliburton brings tangible personal property into Louisiana **for its own use.** It does not sell such property.

First: Halliburton brought into Louisiana certain oil field equipment which it had manufactured at its own production shops in Duncan, Oklahoma. As to such property, Halliburton is a "manufacturer-user."

Question: Whether such an out-of-state manufacturer-user (producer-consumer) may be required to pay a 2% use tax upon the labor-and-shop-overhead element of the cost of the equipment, when—at the same time—an identical manufacturer-user, whose production shops were located in Louisiana, would not be required to pay any tax (sales or use) on this labor-and-shop-overhead element of his cost?

Second: Halliburton purchased (in New York) an airplane and it purchased (in Texas) certain oil field equipment. It then brought the plane and equipment into Louisiana, and used it there. Both purchases were made from concerns which were not regularly engaged in the business of selling such equipment. Such "Isolated Sales," if made in Louisiana, are specifically exempted from the Louisiana Sales Tax. If Halliburton had purchased the properties in such an "isolated sale" in Louisiana, from a Louisiana vendor, there would have been no sales tax on the transaction. So, also, if the New York

vendor and the Texas vendor, had brought property into Louisiana—to the Louisiana market-place—, and if Halliburton had made its purchases in Louisiana, there would be no 2% tax paid by anyone under the Louisiana Sales and Use Tax Statute. Thus, where the purchaser-user (Halliburton) engaged in no multi-state activity and no interstate movement of goods, the purchaser-user is not required to pay this excise tax.

Question: Can Halliburton, the purchaser-user, be required to pay the additional 2% Use Tax as a penalty for having elected to go outside the State of Louisiana, to find a vendor and to make the purchase of the property? Can Louisiana discourage Halliburton (by such a 2% tax) from going outside Louisiana in its search for such a vendor. Can the interstate movements of the purchaser (Halliburton) and the movement of goods in interstate commerce, by the purchaser, properly give rise to a Louisiana excise tax burden (upon the purchaser) which would not have existed if the purchaser had confined himself to the Louisiana market-place?

Halliburton, appellant, submits that both of the foregoing questions must be answered in the negative. In both cases, Louisiana would place the incidence of the additional tax burden upon the act of crossing the state line by the taxpayer. In each case, Louisiana would exempt from the excise tax the taxpayer (in Halliburton's position) who confined himself wholly to the territory within Louisiana's border lines. In each case, Louisiana would demand the tax of the taxpayer (in Halliburton's position) who dared cross the state line.

Because Halliburton selected the site for its production shops in Oklahoma, Louisiana would demand a 2% use tax on the labor-and-shop-overhead element of cost of equipment. If

Halliburton had its shops in Louisiana, no such tax would be due.

Because Halliburton elected to go outside the Louisiana market-place to purchase the plane and equipment (in the "isolated sales"), Louisiana would demand a 2% use tax on the cost of these items. If Halliburton had confined itself to Louisiana (in its search for such vendors) and had purchased the properties in the Louisiana market, no such tax would be due.[1]

In both cases, the distinguishing element of fact is the multi-state activity (of Halliburton) and the interstate movement of property (by Halliburton). There is no other distinction whatsoever. None has ever been suggested by anyone.

In both cases, Louisiana would "discriminate against interstate commerce by giving a direct commercial advantage to local business." Louisiana would lay an excise tax upon the privilege of engaging in interstate commerce.

Halliburton submits that such direct interference with the free flow of interstate commerce is unconstitutional and that it ought to be forbidden by this Court.

ARGUMENT

The Law:

In the landmark decision in the *Northwestern States Portland Cement Company* case (1959)[2] this Court held that a state may levy a **non-discriminatory** net income tax upon con-

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[1] Note the two aspects of the discrimination: (1) Halliburton is taxed solely because it crossed the state line; (2) there is discrimination against out-of-state vendors, in favor of the local market.

[2] *Northwestern States Portland Cement Company v. Minnesota*, and *Williams v. Stockholm Valves & Fittings, Inc.*, 358 U. S. 450, 79 S. Ct. 357, 3 L. Ed. 2d 421, 67 ALR 2d 1292 (1959).

cerns which had theretofore claimed exemption therefrom under the Interstate Commerce clause of the Federal Constitution.

In zealous exercise of its new found freedom to tax the interstate operator, Louisiana now asserts its right to levy an excise tax upon an interstate operation which is heavier and more burdensome than the same tax would be upon the identical operation if it were conducted wholly within the state border lines. Louisiana frankly asserts that it may discriminate against the interstate business and tax it more heavily than its purely intrastate competitor.

Your Honors did not authorize such discrimination. In the *Portland Cement Company* case, this Court took occasion to summarize the law in this field, and said:

> "From the quagmire [of prior decisions] there emerge, however, some firm peaks of decision which remain unquestioned.
>
> "It has long been established doctrine that **the Commerce Clause** gives exclusive power to the Congress to regulate interstate commerce, and its failure to act on the subject in the area of taxation nevertheless **requires that interstate commerce shall be free from any direct restrictions or impositions by the States.** Gibbons v. Ogden, (US) 9 Wheat 1, 6 L ed 23 (1824). In keeping therewith a State 'cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose' such as itinerant drummers. Robbins v. Shelby County Taxing Dist. 120 US 489, 493, 494, 30 L ed 694, 696, 7 S. Ct. 592 (1887). Moreover, **it is beyond dispute that a State may not lay a tax on the 'privilege' of engaging** in interstate commerce, Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602, 95 L ed 573, 71 S. Ct. 508 (1951). Nor may a State impose a tax **which dis-**

criminates against interstate commerce either by providing a direct commercial advantage to local business, Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U. S. 389, 96 L ed 436, 72 S. Ct. 424 (1952); Nippert v. Richmond, 327 U. S. 416, 90 L ed 760, 66 S. Ct. 586, 162 ALR 844 (1946), or by subjecting interstate commerce to the burden of 'multiple taxation,' Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157, 98 L ed 583, 74 S. Ct. 396 (1954); J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 82 L ed 1365, 58 S. Ct. 913, 117 ALR 429 (1938). Such impositions have been stricken because **the States, under the Commerce Clause, are not allowed 'one single-tax worth of direct interference with the free flow of commerce.'** Freeman v. Hewitt, 329 U. S. 249, 256, 91 L ed 265, 274, 67 S. Ct. 274 (1946)." (358 U. S. at p. 427, Emphasis supplied)

Appellant, Halliburton, adopts the foregoing as its summary of the applicable law, and cites as its authorities those cited by this Court, in the above quotation. Upon this statement of the law, Halliburton rests.

Appellant submits that Louisiana is here levying an excise tax upon the "privilege of engaging in interstate commerce." Appellant submits that the tax here at issue clearly "discriminates against interstate commerce . . . by providing a direct commercial advantage to local business"; that the Louisiana Collector's position is an open flaunting of the prohibitory language of this Court, above quoted.

The Discrimination:

The Louisiana Collector has stipulated that he would discriminate. He demands the use tax from Halliburton (to the extent of some $40,000) while stipulating frankly that, if Halliburton conducted its entire operation in Louisiana (in-

stead of partially in other states and partially in Louisiana), he would not be demanding any tax money at all.

We quote from the Collector's stipulations relating to both phases of this case:

First: The Labor and Shop Overhead Phase—

> "**If Halliburton had . . . operated . . . at a location within the State of Louisiana,** there would have been a sales tax due to the State of Louisiana upon the cost of materials purchased in Louisiana and a Use Tax on materials purchased outside Louisiana; but **there would have been no Louisiana sales tax or use tax due upon the Labor and Shop Overhead.**" (R. 26-27)

Second: The Isolated Sale Phase—

> ". . . the entire . . . [purchase price] **would not have been subject to the Louisiana Sales Tax or Louisiana Use Tax had the purchase of such equipment been made within the State of Louisiana.**" (R. 30)

The Collector stipulates that, if this were a purely Louisiana (intrastate) operation, the excise tax would not be demanded. Yet he demands it in this case. And the Louisiana Supreme Court has held that the added element of interstate activity and interstate transportation properly gives rise to the additional tax. Louisiana frankly discriminates against interstate commerce ". . . by providing a direct commercial advantage to local business. . . ."

The Decision of the Louisiana Supreme Court—

Halliburton submits that the situation here is of surpassing simplicity and clearness, viz.,

I. It is the law, stated by this Court, that a state may not, by its taxes, discriminate against interstate commerce by providing a direct commercial advantage to local business. *Portland Cement* case, supra.

II. The Collector has stipulated that the excise tax he demands here would not be due ". . . if Halliburton . . . operated at a location within the State of Louisiana."

How, then, could the Supreme Court of Louisiana possibly conclude that the tax does not discriminate against, and burden, interstate commerce? How could it conclude that no "direct commercial advantage" is given to the purely local operator?

It is difficult to get at the heart of the Louisiana decision. Its language strikes only glancing blows at the problem.

First, the Court points out that the Collector would treat the use tax as if it were a property tax. We quote:

> "The Collector urges that the district court erred in not finding that the incidence of the Louisiana Use Tax is non-discriminatory; that it is equal in its application because it is upon the use of tangible personal property after it has been withdrawn from commerce; that **the combined effect and purpose of the Sales Tax and Use Tax is to insure that all tangible personal property used**

[1] Reproduced at p. 34, *et seq.*, of the Transcript of Record.

or consumed in the State of Louisiana bears a 2% tax, either at the time of its original sale at retail in the state or at the time of its first use in the state if a 2% sales tax has not already been paid by the user to any other state."

Of course, it is settled that the use tax is not a "property tax." It is an excise tax upon the privilege of using.[1] The Louisiana Supreme Court concedes this and quotes from the *Henneford* case,

"The [use] tax is not upon operations of interstate commerce, but upon the privilege of use after commerce is at an end.

"Things acquired or transported in interstate commerce may be subjected to a property tax, **non-discriminatory in its operation,** when they have become part of the common mass of property within the state of destination.

• • •

"For like reasons they may be subjected, when once they are at rest, to a **non-discriminatory** tax upon use or enjoyment.

• • •

"A **non-discriminatory** tax upon local sales . . . has never been regarded as imposing a direct burden upon interstate commerce. . . ." (127 So. 2d, at p. 508)[2]

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[1] Even if a "property tax" approach could be fairly adopted, this would not eliminate the open "discrimination." The *property tax* would be greater, if the labor and shop overhead element of "cost" were incurred outside Louisiana, than it would be if the construction and assembly work were done in Louisiana.

[2] R. 43-44.

Then the Louisiana Court (ignoring the matter of "discrimination") said:

> "We conclude that . . . the use tax as applied to the plaintiff [Halliburton] does not infringe upon the regulation of interstate commerce by Congress. The taxed matter had definitely come to rest in Louisiana and had acquired a situs in the State." (at pp. 508-509)[1]

Next, addressing itself to the question of discrimination, the Louisiana Court said:

> "Plaintiff endeavors to set forth the alleged inequality of the use tax as applied to it by arguing that if a local oil well servicing company had manufactured its own equipment in Louisiana it would only have had to pay a sales tax on the component parts employed, whereas plaintiff has been assessed a use tax not only on the component parts but also on the cost of labor and shop overhead. Plaintiff argues, as set forth, supra, that its burden, as compared to that of a local taxpayer, is so unequal as to constitute a violation of the 14th Amendment to the United States Constitution and of Article I, Section 2, of the Constitution of Louisiana." (at p. 509)[2]

Then the Louisiana opinion quotes Cooley on Taxation, viz.,

> "'What does "equal protection of the laws" mean as applied to taxation? Equal protection cannot be said to be denied by a statute which operates alike on all persons and property similarly situated, or by proceedings for the assessment and collection of taxes which follow the course customarily pursued in the state.'" (at p. 509)[3]

[1] R. 42.
[2] *Ibid.*
[3] R. 46.

Finally the Louisiana Supreme Court simply concludes that the Louisiana tax (although it falls more heavily upon the interstate operator) is not "discriminatory" because the discrimination is only "incidental"! The Court put it this way:

> "We do not find that the Louisiana Use Tax treats any person differently from any other person in a like circumstance. All users are subjected to the same rate of tax; there is no arbitrary or unreasonable distinction. The law contains no hostility nor discrimination; it singles out no class of persons as subjects for its assessment.
>
> "We do not find that the use tax as herein applied imposes an unconstitutional burden on plaintiff. Plaintiff's comparison, supra, is not apposite. There must be an incidence of taxation; there must be an occurrence which brings the use tax into effect. In order to have an imposition of a sales tax, there must be a sale. Likewise, to have a levy of a use tax, property must come to rest in the State after leaving interstate commerce, and there must be a user of the property in the State. In the instant case, the fabricated product was transported to, came to rest in, became part of the common mass of property in, and was used in Louisiana. The proper comparison would be between the use tax on the assembled equipment and a sales tax on the same equipment if it were sold. What takes place before the fabricated product leaves interstate commerce and enters the State of Louisiana to rest is not within the contemplation of the statute except for the determination of cost price. **Labor and shop overhead are considered incidentally together with other items as a basis for arriving at cost."** (at p. 510)[1]

With reference to whether or not the 2% use tax can be put upon the Labor and Shop Overhead element of cost (which

[1] R. 46-47.

is the only issue in this phase of the case), the Court thus concludes:

> "What takes place before the fabricated product leaves interstate commerce . . . is not within the contemplation of the statute **EXCEPT for the determination of cost price.**
>
> "Labor and shop overhead are considered **incidentally** together with other items as a basis for arriving at cost." (at p. 510)[1]

Of course, the only issue at all here is whether or not it is discriminatory to include the labor and shop overhead (whether "incidentally" or otherwise), in the "determination of cost price," for purposes of the use tax calculation. It is the "determination of cost price" which fixes the tax.

The Louisiana court does not, and cannot, come to the point and say "We **include** the labor and shop overhead in the tax base for interstate operators. We **exclude** the labor and shop overhead from the tax base for local (intrastate) operators. Yet this is not discrimination. We give no 'direct commercial advantage to local business' as prohibited by the federal constitution."

Since the Louisiana court cannot face-up to the issue without such a resulting absurdity, the Court sideswipes the issue and says that:

> "What takes place . . . [in] interstate commerce is not . . . [considered] . . .
>
> ". . . EXCEPT for the determination of cost price . . . .

[1] R. 46-47.

"Labor and shop overhead are considered [only] incidentally . . . ."[1]

What Halliburton precisely complains of is the **inclusion** of an item (labor and shop overhead) in the tax base (in the "determination of cost price") where there is a multi-state transaction, whereas the same item (labor and shop overhead) is—incidentally—**excluded** from the tax base in the purely intra-Louisiana situation.

Specifically, Halliburton says that Louisiana is here demanding $40,000 in tax moneys while, simultaneously, stipulating that

"If Halliburton had . . . operated . . . at a location within . . . Louisiana . . .

• • •

"there would have been no . . . tax . . . ." (R. 58)

Let us suppose that Halliburton set up its construction shops in Texas, immediately adjacent to the Louisiana state line. And, let us suppose that a competitor of Halliburton (in exactly the same business) set up its shops just inside the Louisiana line, with a white-washed fence along the state line separating the two operations. When the Louisiana operator produced and used his equipment in Louisiana (a purely intra-state operation), there would be no tax on the labor and shop overhead element of cost. See stipulations. But for each piece of equipment which Halliburton produced on the Texas side (and then brought into Louisiana across that white-washed fence line), Louisiana would demand the two-per-cent tax on the labor-and-shop overhead element of the cost. The two operations would be identical, but—says Louisiana—the move-

[1] R. 47.

ment of the equipment across that state line is enough to give rise to the additional two-per-cent tax. This is the Louisiana Collector's avowed position.[1]

With reference to the "Isolated Sale Phase," the Collector has similarly stipulated that, but for the element of interstate transportation, he would not be demanding the tax. The stipulation is that

> ". . . the entire . . . [purchase price] . . . would not have been subject to the Louisiana Sales Tax or Louisiana Use Tax had the purchase of such equipment been made in Louisiana." (R. 61)

If Halliburton had bought the casually purchased airplane at Moisant Airport, in New Orleans, so that the sale was a Louisiana transaction, it is stipulated that there would be no two-per-cent tax under the Louisiana Sales and Use Tax. Yet, because Halliburton went beyond the Louisiana market, and purchased the airplane in New York and then moved it into Louisiana, the two-per-cent tax (under the same statute) is demanded. Clearly, it is only the element of interstate transportation, by this taxpayer, which differentiates the two factual situations. The Collector would levy an import tax upon the use of goods so purchased.[2]

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[1] Note the 2% inducement to establish the production shops in Louisiana.

[2] Note sharply this fine distinction. Only if the purchaser (the party in Halliburton's position) engages in the interstate activity is this additional use tax demanded. If the **vendor** performs the interstate transportation, and the "isolated" sale is made in Louisiana (on the Louisiana market) there is no sales or use tax to be paid, either by vendor or by purchaser. But, if the purchaser goes outside the state, moves across the state line (and takes title outside the state), then upon the bringing of the property into the state, **by the purchaser**, Louisiana demands a use tax of the purchaser. The use tax is demanded of the purchaser only if the purchaser (himself) engaged in interstate movement of goods.

Yet the Louisiana Court brusquely disposes of this phase of the case by stating:

> ". . . we do not feel constrained to follow the *Alabama* case . . . because we find that the instant matter does not involve a question of interstate commerce." (R. 49)
>
> * * *
>
> . . . we find no discrimination nor deprivation of property without due process of law." (R. 49)

Nevertheless, the fact remains that Louisiana demands that Halliburton pay $40,000 in taxes while stipulating that Halliburton would not have to pay the tax ". . . if Halliburton had . . . operated . . . at a location within the State of Louisiana," (R. 26-27) and the transaction would be ". . . not subject to . . . tax had the purchase been made in Louisiana." (R. 30)

The Decision in Alabama—

In *State v. Bay Towing & Dredging Company, Inc.*, 265 Ala. 282, 90 So. 2d 743 (1956), the Supreme Court of Alabama considered an "isolated sale" case exactly like the present case, except that the property involved in the "isolated sale" consisted of five barges.

The doctrine of the *Bay Towing* case is summarized in its syllabi, from which we quote:

> Syl. 3. Commerce Key 63
>
> "If state use tax is construed as imposing a tax on use in the state of tangible personal property purchased out-

side the state in casual and isolated sales transactions, such tax would constitute an unlawful discrimination against interstate commerce, contrary to commerce clause of the United States Constitution, in view of the fact no similar or equivalent tax burden is imposed in isolated sales transactions within the state. Code 1940, Tit. 51, § 788; U.S.C.A. Const. art. 1, § 8, Cl. 3." (90 So. 2d at p. 743)

Syl. 4. Commerce, Key 63

"If a state use tax integrated with a sales tax places a discriminatory burden upon transactions in interstate commerce, and such burden would not apply to local sales, use tax would become unconstitutional in its operation as violative of commerce clause of Federal Constitution. Code 1940, Tit. 51, Sec. 753, 788. U.S.C.A. Const. art. 1, Sec. 8, cl. 3."

In striking down the Alabama use tax, the Alabama Supreme Court said:

"The position taken by the state is that § 788, Tit. 51, as amended, supra, requires that the tax be paid on tangible personal property purchased outside of the state and brought within the state for storage, use or consumption whether the seller of such property is engaged in the business of dealing in such property or not; that the wording of Section 788 shows such to be the clear legislative purpose. On the other hand, **Bay Company's insistence is that the sales tax and the use tax are complementary, one to the other; that the two laws must be construed together as one integrated, cohesive system of taxation; that unless property would be subject to the sales tax, had the sale occurred within this state, then the use tax cannot apply when the sale occurs without the state;**

that the property here involved would not be subject to the sales tax had the sale taken place here, and hence is not subject to the use tax. The trial court sustained Bay Company's contention, in which we concur.

"(1,2) While the sales tax is levied on the transaction of sale itself and the use tax on the use of property after the sale is completed, it seems clear that the legislature intended that these two tax laws be considered together as embodying **one integrated, cohesive system of taxation.** We have held them to be **complementary, one to the other,** and that the two acts should be construed in pari materia. State v. Advertiser Co., 257 Ala. 423, 59 So. 2d 576; Paramount-Richards Theatres v. State, 256 Ala. 515, 55 So. 2d 812; State v. Southern Kraft Corp., 243 Ala. 223, 8 So. 2d 886; Layne Central Co. v. Curry, 243 Ala. 165, 8 So. 2d 839. The purpose and effect of the two laws is thus succinctly stated in Paramount-Richards Theatres v. State, supra (256 Ala. 515, 55 So. 2d 820):

> "'The measure of the tax under the Sales Tax Act is the retail sales price of the goods; and under the Use Tax Act the measure of the tax is likewise the retail sales price of the goods.
>
> "'The intent and result of this legislation is to impose a sales tax on sales which occur within the state, and a use tax (so called) measured by the retail sale price of goods purchased outside the state for use within the state. **For these reasons these two acts are referred to as being complementary, one to the other. The Use Tax Act is referred to as a compensatory measure,** to equalize the burden of the sales tax and prevent avoidance of the tax by the pu chase of goods in interstate commerce or from side of the state. * * *'

"(3) As we see it, **if the use tax is construed as imposing**

a tax on the use in this state of tangible personal property purchased outside the state in casual and isolated sales transactions, such tax would constitute an unlawful discrimination against interstate commerce, contrary to the Commerce Clause of the United States Constitution, Const. art. 1, § 8, cl. 3, since no similar or equivalent tax burden is imposed in connection with the purchase of such property in casual and isolated sales transactions within the state. This principle was recognized in Paramount-Richards Theatres v. State, supra, where it was said:

> "'If the legislature had imposed a rental tax only upon property shipped into the state in interstate commerce or purchased outside of the state, it would constitute a direct discrimination against interstate commerce, and such provision would therefore be invalid as being in conflict with the interstate commerce clause in the Constitution of the United States; art. 1, § 8, cl. 3. * * *'

"(4,5) The United States Supreme Court has held that a use tax, integrated with a sales tax, in a manner similar to ours, is **not violative** of the Commerce Clause **when such system of taxation does not discriminate against transactions in interstate commerce**, but merely equalizes the burden of taxation on purchases made in interstate commerce and on strictly local sales. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814. Cf. Annotation, 129 A.L.R. 222; Annotation, 153 A.L.R. 609; Note, 54 Colm.L.Rev. 261. **However, if such a system of taxation places a discriminatory burden on transactions in interstate commerce, which would not apply to local sales, the use tax would become unconstitutional in its operation.** Paramount-Richards Theatres vs. State, supra; Anderson v. Mullaney, 9 Cir., 191 F.2d 123, 129, affirmed 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458, Best & Co. v. Maxwell, 311 U.S. 454, 455, 61 S.Ct. 334, 85 L.Ed. 275;

Hale v. Bimco Trading Co., 306 U.S. 375, 59 S.Ct. 526, 83 L.Ed. 771. As said in Best & Co. v. Maxwell, supra (311 U.S. 454, 61 S.Ct. 335):

> "'The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce. • • •'

> **"It seems clear to us that if the sales of the barges had taken place in Alabama there would be no sales tax due because the barges were purchased in 'casual' or 'isolated' sales transaction from concerns not engaged in the business of selling barges but engaged solely in the business of hauling for hire. Therefore, if the use tax act should be construed as imposing the tax on 'casual' and 'isolated' sales in interstate commerce there would result a clear discrimination against such sales."** (90 So. 2d at pp. 746-747)

> • • •

> ". . . in the instant case if Bay Company had bought the barges in Alabama, there would be no sales tax due. Accordingly, if the use tax act should be construed as imposing a tax there would be, as a result, **a clear discrimination against Bay Company's interstate sales transactions.** . . ." (at p. 748)

The Rule in North Dakota, Ohio and California—

It is clear that North Dakota and Ohio are in accord with Halliburton's position, and would follow the Alabama decision. Further, the Supreme Court of California has clearly indicated that it also disagrees with the conclusion of the Louisiana Supreme Court.

North Dakota:

A similar question, re "labor and shop overhead," arose in North Dakota, under Rule No. 55 of the Sales Tax Rules and Regulations. Under date of August 6, 1956, the Office of the Tax Commissioner, through its counsel, Kenneth M. Jakes, rendered the following unpublished opinion:

> "As noted by you sales tax rule No. 55 provides that if a 'contractor or subcontractor manufactures part of the articles used or consumed by him in carrying out his contract, he will be liable for the sales tax of two percent on the cost of manufacture of such articles.'
>
> * * *
>
> ". . . the sales tax does not provide for taxing labor or manufacturing or fabricating costs other than materials used by such a **manufacturer or fabricator who is also the ultimate consumer.**
>
> * * *
>
> **"If these amendments are construed so as to impose a use tax on the total cost of only those items fabricated or manufactured outside this state by a contractor for his use in this state but not on the total cost of similar items fabricated or manufactured in this state by the contractor from materials purchased outside the state, then I believe there is discrimination** on the basis of origin of the finished product such as would be repugnant to the privileges and immunities' and 'equal protection' clauses of the fourteenth amendment to the Federal Constitution and to section 2 of Article 4 of the Federal Constitution relating to privileges and immunities of citizens of each state. See Ex Parte Smith, 100 Fla. 1, 128 So. 864, and cases cited therein, and 16A C.J.S. 226-227.

"If these amendments are construed so as to impose a use tax on the total cost of all items fabricated or manufactured within or outside this state out of materials purchased outside this state by such a contractor, then there is no discrimination insofar as the use tax alone is concerned. However, as to similar items fabricated or manufactured in this state by such a contractor out of materials purchased in this state, the contractor would be liable only for a retail sales tax on the cost of the materials used in manufacturing those items.

"There is a serious question whether such an interpretation would not also **constitute an illegal discrimination or arbitrary and unreasonable classification when it is considered that the sales and use tax laws must be construed together because they are in pari materia.** Since section 57-4003, N.D.R.C. 1943, declares the use tax law to be supplemental to the retail sales tax law, they must be construed together.

* * *

"**Considering the serious constitutional considerations** involved and the legislative purpose of providing a single comprehensive plan of taxation through a retail sales use tax law, it is my conclusion that 'total cost' as used in the 1955 amendment to subsection 5 of section 57-4001 **should be construed to mean only the cost of materials** used in fabricating, compounding, or manufacturing tangible personal property by a person for storage, use, or consumption **by that person.**

In accord with the foregoing, the North Dakota Tax Commissioner, in 1957, amended his Rules No. 55 and No. 113, so

as to eliminate the labor and shop overhead element from the tax base of the use tax.

Ohio:

The Ohio Department of Taxation has come to the same obviously correct conclusion. The burden of the use tax (upon the interstate transaction) cannot exceed the sales tax (upon the similar intrastate transaction), so that **IF** the sales tax does not reach the "labor and shop overhead," the use tax must also exclude from the tax burden the element of "labor and shop overhead."

Section 5741.01(D) of the Ohio General Code, CCH All-State Sales Tax Reporter, paragraph 60-206, provides that the terms "purchase" includes production even though the article produced was used, stored or consumed by the producer, and section 5741.01(G), CCH paragraph 60-209, provides that "if a consumer produces the tangible personal property used by him, the price is the usual and ordinary consideration paid for such tangible personal property." These provisions appear in the Ohio use tax law, but there are no corresponding provisions in the sales tax law, and the cases of *Wellnitz v. Evatt*, 19 Ohio Opinions 330, and *Volk v. Evatt*, 26 Ohio Opinions 417, make it clear that under the sales tax law a **fabricator-contractor is a consumer, taxable only on the purchase price he pays for raw materials,** unless he agrees to furnish fabricated material for one price and to do his construction work for a separate price. In view of these circumstances the Ohio Department of Taxation has issued Circular No. 18 dated March 1, 1954, CCH Ohio State Reporter, paragraph 60371.70, which states the position of the Ohio Department of Taxation to be as follows:

.70 **Tax base for producer-consumer**[1]

"In the case of consumer who produces the tangible personal property used by him, the tax base is the usual and ordinary consideration paid for such tangible property.

"It is the position of the Department that the 'usual and ordinary consideration paid **'shall be construed to mean the cost of the raw material** to the producer-consumer **so as to place such a person in the same category under both the sales and use tax laws and avoid the discrimination that would otherwise exist as to a non-resident producer-consumer."**

We respectfully submit that the position of the Ohio authorities is sound.

California:

In *Chicago Bridge & Iron Company v. Johnson*, 19 Cal. 2d 162, 119 P. 2d 945 (1941), the California Use Tax was upheld as constitutional, as applied to fabricated products imported into California and used there by the fabricator. But the California Court—in so holding—found it necessary to point out specifically that:

"The fallacy of this argument [re unconstitutionality] lies chiefly in its inaccurate assumption . . .

"It is quite true that the tanks, or the completed but unassembled parts, which were shipped into this state were not purchased by the plaintiff in that form; they were manufactured by it. It acquired the raw materials

[1] Hereinabove, we have pointed out that Halliburton is unquestionably a *"manufacturer-user,"* or *"producer-consumer."*

out of which it manufactured or fabricated those completed parts, and it is upon the storage and **use of those materials upon which the tax is based.**

"The tax was computed upon the cost, that is, the sales price **of those materials to plaintiff,** and that is the price which it paid for them.

"The **fabrication and construction** of these materials into the completed article undoubtedly enhanced their value, **BUT the tax is NOT calculated on that value.** It is based on the sales price to plaintiff of the materials which were used to fabricate the finished product, which materials were undoubtedly purchased by plaintiff." (119 P. 2d at p. 948)

Thereupon the Supreme Court of California concluded:

"The use tax as applied to plaintiff does not impose a prohibited regulation or burden on interstate commerce." (at p. 949)

In reaching its decision the California court cited the provision of the California Use Tax statute which (like the Louisiana statute) announced that the state tax was not intended to reach transactions forbidden to it by the Constitution of the United States.

From this opinion, we submit, two things are clear. (1) The California Use Tax statute has been held constitutional **because** it was construed to exclude the "labor and shop overhead" element from its base, and (2) If the California use tax had not been thus construed, it would have been held unconstitutional as "discriminatory."

A Summary of the Rule—

Appellant knows of no published writing, of any sort, anywhere, which supports the position of the Louisiana Collector, except the decision from which appeal is here made. The uniform rule supports appellant here.

In reviewing the jurisprudence and history of use tax legislation, the author of a recent treatise, *Hartman, State Taxation of Interstate Commerce,* sets outs the nature and purpose of this legislation as follows:

> "The residents of a State which has a sales tax likely will confine most of their minor purchases to local stores. They are apt, however, to go bargain hunting outside the State for their major purchases. The unfortunate result of such bargain hunting abroad is not merely a short-changing of the state's coffers, but local merchants whose transactions are subject to the local sales tax find themselves at a competitive disadvantage with an extra-state seller whose sales are subject to no sales tax. The legislatures of the States having a sales tax could not plug these economic leaks by extending the reach of the sales tax."
>
> • • •
>
> "It was to this sort of bargain hunting that the compensating use tax was directed.
>
> **"Compensating use tax statutes take the form of a levy on the privilege of using property within the taxing States, which would have been subject to sales tax had it been purchased within the State. The compensating use tax rate is the same as the local sales tax levy,** and provision is made that no article on which a sales or use tax has once been paid shall again be subject to the use tax. The compensating use tax is thus geared as comple-

mentary to the local sales tax." (p. 161. Emphasis supplied)

Then, almost in words-of-one-syllable, Hartman states that the rule must be that for which appellant here contends:

> "While the compensating use tax has been uniformly cleared of any discriminatory effects, in reaching that conclusion the Court has made an assumption that may be open to some question from an economic standpoint. An assumption by the Court that the tax burden on the consumers of locally bought goods is at least equal to the use tax burden on purchasers of out-of-state goods seems necessarily implicit in the finding that the compensating use tax does not discriminate against interstate commerce. **For, only if there is an equivalency of tax burden on the two types of purchases can it be said that the purchasers of out-of-state goods are not discriminated against.** (Emphasis supplied. At p. 167).

Louisiana Plans Further Discrimination:

Louisiana Act 51 of 1959[1] amended the Sales Tax act to exempt from the sales tax materials and supplies going into vessels "built in Louisiana shipyards," as well as the gross sales prices of such vessels when sold by the builders thereof.

The Louisiana Collector of Revenue would discriminate, however, against a vessel built outside Louisiana, and then brought into Louisiana across the state line. He asserts that as to such a vessel, moved in interstate commerce, Louisiana has the right to collect a use tax measured by the full construction cost price of the vessel. Of course, this is a forthright attempt to give Louisiana shipbuilders a commercial advantage over competitive shipyards in other states.

[1] La. R.S. of 1950, 47:305.1 *Infra*, p. 82.

At the Tulane Institute of Mineral and Tidelands Law, Nov. 14, 1959, Mr. Charles D. Marshall of the New Orleans bar summarized the situation:[1]

"APPLICATION OF THE LOUISIANA USE TAX TO PROPERTY ACQUIRED IN OTHER STATES

"The original justification for the use tax was the necessary protection of the state and its commercial enterprises against out-of-state purchasing to avoid the sales tax. Thus, the use tax has many times been said to be a complement of the sales tax. Constitutionality of the use tax was sustained by the United States Supreme Court on that basis. In *Henneford v. Silas Mason Co.*, that Court said:

> " 'When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed. Equality exists. . . .'

"While it is difficult to form a logical pattern out of all the decisions of the United States Supreme Court, there is one thought which has been expressed again and again in those decisions, and that is that a **state cannot by its tax laws discriminate against interstate commerce.**[2] If a state did not have a sales tax law at all, but imposed only a use tax on property imported from another state, the discrimination against interstate commerce would be

[1] Mr. Marshall's address is reproduced in XXXV Tulane Law Review 183.

[2] *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937), and *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), are important illustrations.

too obvious for argument.[1] If, instead, such state did have a general sales tax law but exempted certain property when it was bought within the state while taxing the use of the same exempted property when it was bought outside the state, the principle is the same. The use tax would be discriminatory because of the unequal exemptions.

As a matter of principle, then, the use tax can never be any broader in its application to property imported into Louisiana than would the sales tax be if the property were purchased here in the first place. The regulations under the Louisiana sales tax seem to agree: they contain a general statement that the use tax applies only where the sales tax would apply if the property had been sold in this state.[2] The Louisiana Supreme Court has used broad language to the same effect.[3] There are strong implications in the law itself to that end.[4] Nevertheless, the Department of Revenue is contending in at least two situations that the use tax is broader than the sales tax.

"In the first situation, **the Department maintains** that even though, prior to the 1959 Statute, sales tax might not have been due upon the construction of a vessel in Louisiana, **nevertheless, in the case of a vessel built outside Louisiana and brought into Louisiana, the state has the right to collect a use tax measured by the full construction price of the vessel.** The attorneys for the Department of Revenue advised that they have been suc-

[1] See *Memphis Steam Laundry v. Stone*, 342 U.S. 389 (1952); *Walling v. Michigan*, 116 U.S. 446 (1886), for statements of the controlling principle.

[2] Regulations, art. 2-3.

[3] *Chrysler Corp. v. New Orleans*, 238 La. 123, 114 So.2d 579 (1959); *Fontenot v. S. E. W. Oil Corp.*, 232 La. 1011, 95 So.2d 638 (1957); *Mouledoux v. Maestri*, 197 La. 525, 2 So.2d 11 (1941).

[4] La. R.S. of 1950, 47:303, states that the importer shall pay a use tax "the same as if the said articles had been sold at retail for use or consumption in this state."

cessful in collecting substantial amounts of taxes under that approach. It is nevertheless the belief of the writer that the Department of Revenue cannot succeed in court with that approach, because, as a matter of statutory interpretation, the Louisiana use tax does not have a broader application than the sales tax, and further, even if it did, **the use tax would to that extent be a plain discrimination against interstate commerce.**

"The second instance in which the representatives of the Department of Revenue claim that the use tax is broader than the sales tax is with regard to the casual sales. In Louisiana, the sales tax does not apply to an isolated or occasional sale by a person not engaged in the business of making such sales.[1] However, the Department of Revenue maintains that there is no such thing as a 'casual use.' Thus, if one buys a drilling rig in Texas from a casual seller and takes delivery of it in Texas, the subsequent importation of the rig into Louisiana will result in a claim of use tax. Yet, if the sale had been made locally in Louisiana, where it would qualify as a casual sale for sales tax purposes, the Department would admit the transaction to be exempt. Discrimination against interstate commerce is evident in this position also.[2]

"In line with its attitude on these other issues, the Department of Revenue will, no doubt, try to collect use tax on vessels of fifty or more tons load displacement built outside Louisiana and imported into the state after enactment of Act 51 of 1959. It will be recalled that the 1959 Statute only extends its favors to vessels 'built in Louisiana.' As in the two instances discussed above, that requirement constitutes a discrimination against interstate commerce. The consequence is that the words 'built in

[1] La. R.S. of 1950, 47:301.

[2] *State v. Bay Towing & Dredging Co.*, 265 Ala. 282, 90 So.2d 743 (1956). Litigation on this issue is now pending in the Louisiana courts.

Louisiana' will have to be regarded as not written. Vessels built outside Louisiana must be entitled to the same privileges and exemptions as are the ones which have been built here. It may take litigation to settle the issue but the proper result seems reasonably clear.

* * *

"If it is correct that the materials used in repairs to vessels built in Louisiana are exempt, then, the provisions of the 1959 statute notwithstanding, the same exemption must, in order to avoid discrimination against interstate commerce, run in favor of vessels built outside Louisiana, provided, of course, such vessels are of the necessary qualifying size. Thus the requirement that the vessels be 'built in Louisiana' may have to be disregarded by the courts here also." (XXXV Tulane L. Rev. at pp. 194, 195 and 198)

It is clear that the Louisiana Collector, and the Louisiana Supreme Court, feel that Louisiana ought to be free to discriminate at will in favor of intra-state Louisiana businessmen, and against those who operate their businesses across state lines, in interstate commerce.[1]

We submit that this Court should take this opportunity to make it clear to Louisiana, and other states, that state taxation may not be designed and enforced so as to give a direct commercial advantage to local business.

[1] The proposition that Louisiana demands the use tax upon vessels "made **outside** Louisiana," while exempting from the sales tax vessels "made **in** Louisiana," is **not hypothetical**. See Brief filed in support of the Jurisdictional Statement, by Thomas Jordan, Inc., *Amicus Curiae*.

The Collector's Motion to Dismiss This Appeal—

FIRST: "Separate, But Almost Equal"

The Louisiana Collector of Revenue argues:

"Louisiana has accomplished an **almost perfect equalization** of the 2% tax burden. . . ."[1]

Like the Louisiana Supreme Court, he contends that the burden upon interstate commerce is "purely incidental."[2] The Collector thus concedes that there is some discrimination against the interstate operator, but he argues that there is ". . . **almost** perfect . . ." equality of treatment, and — in effect—that the "incidental" discrimination is *de minimis*.

We respectfully submit that the Collector is in error. The issue here is very substantial, not only in the number of dollars involved, but in the number of taxpayers concerned.

Within the scant thirty days from the filing of the Jurisdictional Statement, the following taxpayers filed briefs *amicus curiae*, urging this Court to note jurisdiction and to determine this issue against the Louisiana Collector:

1. Humble Oil and Refining Company
2. Chicago Bridge and Iron Company
3. Sperry Rand Corporation (Remington Rand Division)
4. Thomas Jordan, Inc.
5. American Can Company

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[1] Motion to Dismiss, p. 9.
[2] Motion to Dismiss, p. 12.

6. Rosson-Richards Processing Company

7. Wate-Kote Co., Ltd.

The sums of money involved for seven of the eight taxpayers who have appeared herein are:

1.	Halliburton Oil Well Cementing Company	$ 40,642.65
2.	Humble Oil and Refining Company	18,659.95[1]
3.	Chicago Bridge and Iron Company	82,226.41[2]
4.	Sperry Rand Corporation	4,710.93[3]
5.	Thomas Jordan, Inc.	49,999.24[4]
6.	American Can Company	(amount not stated)
7.	Rosson Richards Processing Co.	24,126.90[5]
8.	Wate-Kote Co., Ltd.	6,746.90[5]
	Total (for the tax years now at issue)	$227,112.98

And, as Chicago Bridge and Iron put it, "such taxes continue to acrue . . ."[6] from year to year.

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[1] Humble's Brief *Amicus Curiae*, p. 3. Note that this $18,659.95 is actually included in Chicago Bridge and Iron's $82,226.41. *Ibidem*, fn. 1.

[2] Chicago Bridge's Brief *Amicus Curiae*, p. 3.

[3] Speery Rand's Brief *Amicus Curiae*, p. 3.

[4] Thomas Jordan's Brief *Amicus Curiae*, p. 2.

[5] Joint Brief filed, *Amicus Curiae*, on behalf of Rosson Richards Processing Company and Wate-Kote Co., Ltd., p. 3.

[6] Brief, *Amicus Curiae*, at p. 4. Note that the tax years actually at issue for Halliburton are 1952 through 1955. The tax for subsequent years awaits the determination of this case.

Of course, the chorus of protest in these *amicus curiae* briefs is only from a representative cross-section of the hundreds of taxpayers who engage in interstate activities reaching into Louisiana and who, therefore—as this Court may judicially notice—are directly affected by the ruling of the Louisiana Supreme Court—which authorizes heavier taxation upon interstate operators, and lighter taxation upon their purely intrastate competitors.

As this Court may judicially observe—and as the Collector will readily concede—many millions of dollars of taxpayers' money hang upon the final determination of this case.

The Collector frankly contends that Louisiana may erect a multi-million-dollar tax barrier at the state border lines, thus openly impeding the flow of interstate commerce. And he argues that he may do this, because the impediment is created by discrimination which is only "incidental." He argues that there is ". . . **almost** perfect equality of treatment," and that this is enough to satisfy the federal constitution.

It is respectfully submitted that the Collector's **"Almost-Equal"** argument is specious, and—further—that it is without foundation in fact.

SECOND: The Collector Would Compare the Incomparable.

The Louisiana Supreme Court, adopting the Collector's arguments stated:

> "The proper comparison would be between the use tax on the assembled equipment and a sales tax on the same equipment IF it were sold. . . ."[1]

[1] R. 47.

The Collector develops this misleading comparison at p. 9 of his Motion to Dismiss, viz.,

> "The 2% sales tax and the 2% use tax if applied consistently as the Collector has applied it in this case, will assure that prior to the first use or consumption of any and all tangible property in the state, **such property shall bear a 2% tax burden,** either by virtue of its first sale at retail or by virtue of its first use in the State of Louisiana."
>
> "Thus, every person in the state who first uses or consumes tangible personal property is placed on an equal economic basis with every other person using or consuming similar property."

We adopt the following clear discussion from the brief, *amicus curiae*, filed by the Chicago Bridge and Iron Company:

> ". . . the **comparison suggested by the court is wholly improper.** The assembled equipment was, in fact **not** sold by Halliburton. The absence of discrimination against Halliburton vis-a-vis local competitors who **sell** assembled equipment is immaterial. The damaging discrimination exists with respect to local competitors who, like Halliburton, do **not** sell, but who, unlike Halliburton, fabricate in Louisiana. **The cases that uphold non-discriminatory taxation of interstate commerce do not determine the presence or absence of discrimination by comparing the treatment of wholly unlike transactions.** On the contrary, their plain teaching is that the determination must be made by comparing the taxation of an interstate transaction with the taxation of an identical transaction carried out entirely within the taxing state. If a State wishes to tax 'the stranger from afar' in respect of what he does outside the state, it must collect no greater toll from him

than it collects from one of its own citizens **who does the same things** within its borders. This standard of equality Louisiana has stipulated that it does not meet."[1] (Emphasis supplied.)

The Louisiana Collector has stipulated that Halliburton (or a competitor of Halliburton in exactly the same line of endeavor) would pay no sales or use tax on the labor-and-shop-overhead if it set up its fabrication shops in Louisiana. Indeed, in his Motion to Dismiss, the Collector affirmatively argues that a taxpayer in Halliburton's position could ". . . reduce his tax burden by manufacturing [his] equipment in Louisiana for his own use."[2]

The Collector ignores (and would have the Court ignore) the fact that Halliburton is a **manufacturer, which uses its own work product.** Halliburton is a "manufacturer-user," sometimes called a producer-consumer. The fairness, and legality, of Halliburton's tax burden cannot be determined by comparing its economic activity with that of an intra-state seller or **purchaser-at-retail.**

This is the Collector's basic fallacy. He would argue that the tax burdens are equal (upon the Louisiana residents and the out-of-state persons) because the sales tax, paid by **a purchaser-at-retail** in Louisiana, includes labor and overhead.

With respect, this is an effort to compare the incomparable. The price paid by a purchaser at retail (upon which a sales tax is paid) includes three elements (a) the cost of the

[1] Chicago Bridge and Iron Company. Brief *Amicus Curiae*, at pp. 5-6.

[2] Motion to Dismiss, at p. 10.

physical parts incorporated in the finished product, (b) the labor and overhead element, and (c) the profit.

It is perfectly proper to compare the sales tax upon a sale-at-retail in Louisiana, with a use tax levied upon property **purchased** from a retail dealer outside the state, and then brought into Louisiana. In this case the two economic transactions are the same (purchase at retail in each case). And, in such situation the Collector makes no effort to increase the tax base by reason of the interstate movement.

But this is not what the Collector contends for here. He would compare the economic activity (the business endeavor) of an **out-of-state "manufacturer-user"** (Halliburton) with that of an **intra-state purchaser-at-retail.**

And this is the specious element in the Collector's argument. One cannot fairly compare optical lenses with fried eggs, nor compare peaches with new-born-chicks. To test for discrimination, one must compare the comparable.

We submit that the only fair comparison would be to compare the tax burden of an **out-of-state manufacturer-user,** with the tax burden of an **intra-state manufacturer-user.** In other words, if Halliburton had in Louisiana a direct competitor, in exactly the same operation, would the tax burden of each be the same?

Obviously, the Collector would demand the 2% use tax solely from Halliburton, the out-of-state operator, and he would exempt the intra-state operator. We submit that the Collector's position is discriminatory and illegal; that his position is unsound.

THIRD: The Collector Argues that ". . . the property has not already borne a similar tax . . ." in Any Other State.

At pages 2, 3 and 9 of the Motion to Dismiss, the Collector makes this argument without articulating any conclusion therefrom. For example, at p. 3 the statement, *in toto*, is

> "None of the property has ever been subjected in any other state to a similar tax."

In some obscure way, the Collector seeks freedom to discriminate here because this equipment was not taxed under the Oklahoma Sales Tax.[1]

This argument is wholly fallacious. If the Oklahoma Sales Tax law had been applicable, then the sales tax that would have been paid to Oklahoma would have been a 2% tax on the cost of the tangible physical components which were built into the finished equipment. Of course, there would have been no Oklahoma sales tax on the labor-and-shop-overhead element of cost. Thus, when the mobile truck-borne equipment was put in motion and driven up to the Louisiana state line, it would have already borne a 2% tax upon its tangible physical parts, but no tax would have been paid upon the labor-and-shop-overhead element of its cost. This is exactly the same situation as that which now exists. A 2% tax has been paid to Louisiana, upon all of the value of this equipment, except the labor-and-shop-overhead element. Louisiana is demanding a 2% tax on the labor-and-shop-overhead cost of this imported equipment, although, admittedly, it would not have taxed this element of cost in equipment fabricated in Louisiana. Similarly, if Oklahoma had collected a 2% sales tax,

[1] The components of this equipment were exempt from the Oklahoma Sales Tax because the production was for export.

Louisiana would credit the taxpayer with the tax paid to Oklahoma (the tax on the tangible equipment) but would still demand the tax on labor-and-shop-overhead. The Louisiana statute specifically provides that "If the tax paid in another state is not equal to . . . the amount of tax imposed by this chapter . . . ," the importing user must pay the difference. (La. R.S. 47.305. *Infra*, p. 82.)

Therefore, it is clear beyond dispute that, if Oklahoma had collected a **Sales** tax on the components, Louisiana's position would be unchanged. Louisiana would still demand 2% of the labor-and-shop-overhead, while exempting this item of cost where such fabrication occurred entirely within Louisiana's borders. *Ergo*—Discrimination against interstate commerce.

Whatever point the Collector intended to make here, it is without merit.

FOURTH: A Problem of "Management." Save Louisiana Taxes by Manufacturing in Louisiana.

The Collector argues that for Halliburton, this is

> ". . . not an interstate commerce problem but a problem of management in locating and so arranging its operations in such manner as to reduce its cost of operations to a minimum."[1]

And, he concedes that, if he is sustained here,

> " taxpayer may reduce his tax burden by manufacturing equipment within Louisiana for his own use."[2]

The Collector thus admits that the tax burden upon the out-of-state taxpayer (the multi-state operator) is not equal

[1] Motion to Dismiss, p. 13.
[2] *Ibid.*, p. 10.

to, but is heavier than the burden upon the purely intra-state taxpayer. Yet, again and again he gives lip-service to the "fundamental purpose of equality of the Louisiana Use Tax."[1]

The Collector's argument is incredible. He contends that Louisiana's position is non-discriminatory. Simultaneously he argues that, by good corporate "management," Halliburton could avoid this Louisiana tax by ceasing its interstate movement, and becoming a purely intra-state operator, having its entire operation within Louisiana's borders! !

We respectfully submit that this is a case of gross avowed discrimination against interstate commerce contrary to the federal constitution.

CONCLUSION

Appellant taxpayer's position is simply this:

I. The Use Tax falls upon the use of goods imported across state lines, *i.e.*, upon transactions in interstate commerce.

II. The Use Tax has been upheld, as constitutional, and as **not** a discriminatory burden upon interstate commerce, SOLELY BECAUSE (in the case then at issue) it **did not exceed the sales tax**, but was merely complementary to the sales tax and precisely equal to the sales tax, and—therefore—the use tax did not "discriminate" against the interstate transaction. *Henneford v. Silas Mason Company*, 300 U.S. 577, 81 L. Ed. 814, 57 S. Ct. 524.

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[1] *Motion to Dismiss*, p. 11.

III. Therefore, whenever the use tax (falling solely on **interstate** transactions) is more onerous than the sales tax (falling on comparable **intra**state transactions) then the use tax loses the fiat of the *Henneford* decision, and is unconstitutional **because it does discriminate** against the transactions which are in interstate commerce.

The taxpayer, Halliburton, contends that, **in any case** where the burden of the use tax is more onerous than the sales tax (on the comparable intrastate transaction) would be, then the use tax—as so applied—is not supported by the *Henneford* decision, and the use tax statute is violative of the federal constitution.

If, ". . . the stranger from afar . . ." is to bear a burden no heavier than that of ". . . the resident of Louisiana . . ." (as the Collector concedes, and even argues), then the only comparison that can be made is to compare **the burden which falls upon the taxpayers** in the two cases, by asking three simple questions:

1. What is the tax burden upon the **out-of-state taxpayer,** the "stranger from afar"?

2. What is the tax burden upon the **intra-state taxpayer,** the Louisiana resident?

3. **Are these two tax burdens equal?**

The Collector has stipulated that Halliburton (or a competitor of Halliburton in the same line of endeavor) would pay no sales or use tax if it set up its shops, and operated, in Louisiana. Yet the Collector demands a 2% use tax from Hal-

liburton. How can the Collector seriously argue that this is equality of treatment? The answer is that he cannot.

Can the "compensating" use tax of a state, in any case, reach further or be more burdensome than the sales tax of that state, to which latter tax the Use Tax is supposed to be complementary? Can the burden of the Use Tax (falling upon an out-of-state "manufacturer-user") be heavier than the burden of the sales tax which would fall upon the comparable (and competing) intra-state "manufacturer-user"?

Suppose, in a given state, that the two-per-cent Sales Tax (which falls upon intra-state sales) were totally repealed, but that the two-per-cent Use Tax were retained, in such manner that it fell only upon the use of goods purchased outside the state and then imported across state lines. Would the Use Tax, in such a case be constitutional? We respectfully submit that it would not. The Use Tax (upon use of imported goods) was upheld by the United States Supreme Court in the *Henneford* case, *supra*, because (and only "because") it was a compensatory and complementary tax, coextensive and coterminous, with the Sales Tax of the same state. If the Sales Tax were totally repealed, then there would be no support for the Use Tax (solely levied on imported goods). The *Henneford* doctrine would not apply. The Use Tax (upon use of imported goods) could not stand alone, in the absence of a similar and coextensive Sales Tax upon the comparable intra-state situation.

Suppose, again, that the Sales Tax were partially repealed. Suppose, for example, that the Louisiana Sales Tax statute was amended to exclude the sale of automobiles in Louisiana. And suppose, at the same time, that the law continued to levy

a two-per-cent Use Tax, solely upon the use in Louisiana of automobiles purchased outside of the state, and then brought into the state, across the state line. Is it not obvious that this would discriminate, to the extent of the 2% tax, against interstate transactions, in favor of the comparable intra-state transactions? Is this not the type of "discrimination" which is forbidden by the Commerce Clause and by the Due Process Clause of the United States Constitution? Can a contrary argument be seriously advanced?

Suppose the Use Tax were increased to 3%[1], and the (intra-state) Sales Tax kept at 2%, would not this be unconstitutional discrimination?

Does it not follow, that **in any and every case whatsoever** (and particularly in the present case) where the burden of the Use Tax extends beyond that of the Sales Tax and where the Use Tax falls more heavily upon the interstate situation than the Sales Tax would fall upon the comparable intrastate situation, then the Use Tax, as so applied, is unconstitutional and void, as violative of the Federal Constitution.

Where the Sales Tax ends, the Use Tax must end.

As the Supreme Court of Alabama[2] said:

> "(4,5) The United States Supreme Court has held that a use tax, integrated with a sales tax, in a manner similar to ours, is not violative of the Commerce Clause when such system of taxation does not discriminate against transactions in interstate commerce, but merely equalizes the burden of taxation on purchases made in interstate commerce and on strictly local sales. . . . [citations] However, if such a system of taxation places a discrimini-

[1] Or, increased to 50%? Or, 100%?

[2] *State v. Bay Towing and Dredging Co., Inc.*, 265 Ala. 285, 90 So. 2d 743 (1956).

natory burden on transactions in interstate commerce, which would not apply to local sales, the use tax would become unconstitutional in its operation. . . . [citations] As said in Best & Co. v. Maxwell, supra (311 U.S. 454, 61 S. Ct. 335):

> "'The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce. * * *'"

If the interstate **Use** Tax can exceed the intrastate **Sales** Tax, where is the line to be drawn? Could the Use Tax be fixed at 50% and the Sales Tax at 2%, thus creating a tax wall around the state?

In the present case the **Louisiana Collector has stipulated that he would discriminate**, and would tax only the "stranger from afar," while exempting Louisiana operators. We submit that the Federal Constitution forbids this.

It is submitted that the position of the taxpayer, Halliburton, is completely sound; that all existing authority supports its position; that no authority to the contrary exists anywhere; that the Constitution of the United States strikes down the position of the Louisiana Collector, which is arbitrary and capricious, and violative of the commerce clause of the federal constitution and of the Fourteenth Amendment.

Appellant earnestly submits that this Court, having noted probable jurisdiction, should rule that the Constitution of the United States forbids the **"forthright discrimination"** which the Louisiana Collector would practice in this case.

Since the use tax moneys held in escrow, by the Louisiana Collector, are demanded and held solely because Halliburton engaged in interstate commerce, and since the levy and collection of said use tax moneys were a discrimination against interstate commerce, appellant submits that the judgment of the Louisiana Supreme Court should be reversed, and the judgment of the trial court affirmed, thus awarding to appellant judgment in the sum of Forty-three thousand, three Hundred twenty-five and 63/100 ($43,325.63) Dollars, with interest at the rate of 2% per annum from December 13, 1956 until payment is made.[1]

The Court is respectfully referred to the Summary of Argument[2] for a resume of appellant's contentions.

Respectfully submitted,

C. VERNON PORTER
BENJAMIN BROWN TAYLOR, JR.
TOM FORE PHILLIPS

Attorneys for Appellant, Halliburton Oil Well Cementing Company

Taylor, Porter, Brooks, Fuller & Phillips,
1100 Louisiana National Bank Building
Baton Rouge, Louisiana

Baton Rouge, Louisiana
November 19, 1961

[1] See Judgment of the Trial Court (R. 31) and Opinion of the Louisiana Supreme Court (R. 50). Note that the trial judge awarded $43,325.63. The Supreme Court of Louisiana reduced this to the sum of $2,682.98 which was the amount dependent upon the uncontested Third Phase of this case. The difference, or $40,642.65, plus interest, is at issue here.

[2] *Supra*, p. 27.

PROOF OF SERVICE

I, Benjamin Brown Taylor, Jr., one of the attorneys for Halliburton Oil Well Cementing Company, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1st day of December, 1961, I served a copy of the foregoing *Brief for the Appellant*, upon the following named persons, by mailing—postage prepaid—a copy thereof to each of them at their offices at the respective addresses set out opposite the name of each, viz.,

(1) Roland Cocreham, Collector of Revenue, Appellee
% Chapman Sanford, Attorney of Record, and
John B. Smullin, Attorney of Record
Capitol Annex Building
Baton Rouge, Louisiana

(2) Humble Oil and Refining Company, *Amicus Curiae*
% Forest M. Darrough, Attorney of Record
1216 Main Street
Houston, Texas

(3) Chicago Bridge and Iron Company, *Amicus Curiae*
% Albert L. Hopkins, Attorney of Record
Hopkins, Sutter, Owen, Mulroy and Wentz, Attorneys
One North LaSalle Street
Chicago 2, Illinois

(4) Sperry Rand Corporation, *Amicus Curiae*
% Cicero C. Sessions, Attorney of Record
Sessions, Fishman, Rosenson & Snellings, Attorneys
1333 National Bank of Commerce Building
New Orleans 12, Louisiana

(5) Thomas Jordan, Inc., *Amicus Curiae*
% Charles D. Marshall, Attorney of Record
Milling, Saal, Saunders, Benson and Woodward
1122 Whitney Building
New Orleans 12, Louisiana

(6) American Can Company, *Amicus Curiae*
% Ben R. Miller, Attorney of Record
Sanders, Miller, Downing, Rubin and Kean
P. O. Box 1588
Baton Rouge, Louisiana

(7) Rosson Richards Processing Company, *Amicus Curiae*
% Robert E. Leake, Jr.
1207 Whitney Bldg.
New Orleans 12, Louisiana

(8) Wate-Kote Company, Ltd., *Amicus Curiae*
% Robert E. Leake, Jr.
1207 Whitney Bldg.
New Orleans 12, Louisiana

BENJAMIN BROWN TAYLOR, JR.
Attorney of Record for
Halliburton Oil Well Cementing
Company, *Appellant*

Baton Rouge, Louisiana
December 1, 1961

APPENDIX "A"

Pertinent Provisions of The Louisiana Sales Tax Law[1]

Chapter 2 of Subtitle II of Title 47, Louisiana Revised Statutes of 1950, as Amended

LOUISIANA SALES TAX LAW

Sec.

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1. Generally known as the *Sales and Use Tax Law.*
This statute is reproduced *in full*, as Appendix "B" to Appellant's Jurisdictional Statement, at p. 69.

§ 301. Definitions

As used in this Chapter, the following words, terms and phrases have the meaning ascribed to them in this Section, except when the context clearly indicates a different meaning.

(1) "Business" includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit, or advantage, either direct or indirect. The

term "business" shall not be construed to include the occasional and isolated sales by a person who does not hold himself out as engaged in business.

(2) "Collector" means the Collector of Revenue for the State of Louisiana and includes his duly authorized assistants.

(3) "Cost price" means the actual cost of the articles of tangible personal property without any deductions therefrom on account of the cost of materials used, labor or service cost, transportation charges or any other expenses whatsoever.

(4) "Dealer" includes every person who manufacturers or produces tangible personal property for sale at retail, for use, or consumption, or distribution or for storage to be used or consumed in this state.

"Dealer" is further defined to mean;

(a) every person who imports, or causes to be imported, tangible personal property from any state or foreign country for sale at retail, for use, or consumption, or distribution, or for storage to be used or consumed in this state;

(b) every person who sells at retail, or who offers for sale at retail, or who has in his possession for sale at retail, or for use or consumption, or distribution, or storage to be used or consumed in this state, tangible personal property as defined herein;

(c) any person who has sold at retail, or used, or consumed or distributed, or stored for use or consumption in

this state, tangible personal property and who cannot prove that the tax levied in this Chapter has been paid on the sale at retail, the use, the consumption, the distribution or the storage of said tangible personal property;

(d) any person who leases or rents tangible personal property for a consideration, permitting the use or possession of the said property without transferring title thereto;

(e) any person who is the lessee or rentee of tangible personal property and who pays to the owner of such property a consideration for the use or possession of such property without acquiring title thereto;

(f) any person who sells or furnishes any of the services subject to tax under this Chapter;

(g) any person, as used in this act, who purchases or receives any of the services subject to tax under this Chapter;

(h) any person engaging in business in this state. "Engaging in business in this state" means and includes any of the following methods of transacting business: maintaining directly, indirectly, or through a subsidiary, an office, distribution house, sales house, warehouse or other place of business or by having an agent, salesman or solicitor operating within the state under the authority of the seller of its subsidiary irrespective of whether such place of business, agent, salesman or solicitor is located in this state permanently or temporarily or whether such seller or subsidiary is qualified to do business in this state.

(9) "Purchaser" means and includes any person who acquires or receives any tangible personal property, or the privilege of using any tangible personal property, or receives any services pursuant to a transaction subject to tax under this Chapter.

(10) "Retail sale" or "sale at retail," means a sale to a consumer or to any person for any person other than for resale in the form of tangible personal property, and shall mean and include all such transactions as the collector, upon investigations, finds to be in lieu of sales; provided that sales for resale must be made in strict compliance with the rules and regulations. Any dealer making a sale for resale, which is not in strict compliance with the rules and regulations, shall himself be liable for and pay the tax.

The term "sale at retail" does not include sales of materials for further processing into articles of tangible personal property for sale at retail, nor does it include an isolated or occasional sale of tangible personal property by a person not engaged in such business.

(11) "Retailer" means and includes every person engaged in the business of making sales at retail or for distribution, or use or consumption, or storage to be used or consumed in this state.

(12) "Sale" means any transfer of title or possession, or both, exchange, barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property, for a consideration, and includes the fabrication of tangible personal property for consumers who furnish, either directly or indirectly, the materials used in fabrica-

tion work, and the furnishing, preparing or serving, for a consideration, of any tangible personal property, consumed on the premises of the person furnishing, preparing or serving such tangible personal property. A transaction whereby the possession of property is transferred but the seller retains title as security for the payment of the price shall be deemed a sale.

(13) "Sales price" means the total amount for which tangible personal property is sold, including any services, except services for financing, that are a part of the sale valued in money, whether paid in money or otherwise, and includes the cost of materials used, labor or service costs, except costs for financing which shall not exceed the legal interest rate and a service charge not to exceed 6 percent of the amount financed, and losses; provided that cash discounts allowed and taken on sales shall not be included, nor shall the sales price include the amount charged for labor or services rendered in installing, applying, remodeling or repairing property sold.

(Source: Act 143—1954)

* * *

(15) "Storage" means and includes any keeping or retention in this state of tangible personal property for use or consumption in this state or for any purpose other than for sale at retail in the regular course of business.

(16) "Tangible personal property" means and includes personal property which may be seen, weighed, measured, felt or touched, or is in any other manner perceptible to

the senses. The term "tangible personal property" shall not include stocks, bonds, notes, or other obligations or securities.

* * *

(18) "Use" means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it shall not include the sale at retail of that property in the regular course of business.

(19) "Use tax" includes the use, the consumption, the distribution and the storage, as herein defined.

(Source: Acts 1948, No. 9, § 6.)

§ 302. Imposition of tax

A. There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:

(1) At the rate of two per centum (2%) of the sales price of each item or article of tangible personal property when sold at retail in this state; the tax to be computed on gross sales for the purpose of remitting the amount of tax due the state, and to include each and every retail sale.

(2) At the rate of two per centum (2%) of the cost price of each item or article of tangible personal property when the same is not sold but used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax.

* * *

The tax levied in this Section shall be collected from the

dealer, as defined herein, shall be paid at the time and in the manner hereinafter provided, and shall be, in addition to all other taxes, whether levied in the form of excise, license, or privilege taxes, and shall be in addition to taxes levied under the provisions of Chapter 3 of Subtitle II of this Title.

(Source: Acts 1948, No. 9, § 2.)

§ 303. Collection from dealer

The tax imposed under R.S. 47:302 shall be collectible from all persons, as hereinafter defined, engaged as dealers, as hereinafter defined.

On all tangible personal property imported, or caused to be imported, from other states or foreign country, and used by him, the "dealer," as hereinafter defined, shall pay the tax imposed by this Chapter on all articles of tangible personal property so imported and used, the same as if the said articles had been sold at retail for use or consumption in this state. For the purposes of this Chapter, the use, or consumption, or distribution, or storage to be used or consumed in this state of tangible personal property, shall each be equivalent to a sale at retail, and the tax shall thereupon immediately levy and be collected in the manner provided herein, provided there shall be no duplication of the tax in any event.

(Source: Acts 1948, No. 9, § 3.)

* * *

§ 305. Exclusions and exemptions from the tax

* * *

It is not the intention of this Chapter to levy a tax upon articles of tangible personal property imported into this state, or produced or manufactured in this state, for export; nor is it the intention of this Chapter to levy a tax on bona fide interstate commerce. It is, however, the intention of this

Chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state.

The provisions of this Chapter shall not apply in respect to the use, or consumption, or distribution, or storage of tangible personal property for use or consumption in this state, upon which a like tax equal to, or greater than, the amount imposed by this Chapter has been paid in another state, the proof of the payment of such tax to be according to rules and regulations made by the collector of revenue. If the amount of tax paid in another state is not equal to, or greater than, the amount of tax imposed by this Chapter, then the dealer shall pay to the collector of revenue an amount sufficient to make the tax paid in the other state and in this state equal to the amount imposed by this Chapter.

* * *

§ 305.1 Exclusions and exemptions; ships and ships' supplies

A. The tax imposed by R.S. 47:302 (A) (1) shall not apply to sales of materials, equipment and machinery which enter into and become component parts of ships, vessels, including commercial fishing vessels, or barges, of fifty tons load displacement and over, built in Louisiana, nor to the gross proceeds from the sale of such ships, vessels, or barges when sold by the builder thereof.

B. The taxes imposed by R.S. 47:302 shall not apply to materials and supplies purchased by the owners or operators of ships or vessels operating exclusively in foreign or interstate coastwise commerce, where such materials and supplies

are loaded upon the ship or vessel for use or consumption in the maintenance and operation thereof; nor to repair services performed upon ships or vessels operating exclusively in foreign or interstate coastwise commerce; nor to the materials and supplies used in such repairs where such materials and supplies enter into and become a component part of such ships or vessels; nor to laundry services performed for the owners or operators of such ships or vessels operating exclusively in foreign or interstate coastwise commerce, where the laundered articles are to be used in the course of the operation of such ships or vessels.

C. The provisions of this section do not apply to drilling equipment used for oil exploitation or production unless such equipment is built for exclusive use outside the boundaries of the state and is removed forthwith from the state upon completion.

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APPENDIX "B"

[¶200-114] Letter from Legal Division, Department of Revenue, July 13, 1956. [Re **Intra**state Production][1]

Sales and use tax—Use tax liability.—When supply items are purchased at retail in Louisiana and are manufactured, fabricated and assembled in Louisiana into a finished product for use solely by the purchaser and are not held or offered for resale, use tax would not be applicable to the finished items. The purchaser should pay the sales tax on the sales price of the supply items when purchased.

When supply items are purchased at retail outside the state and brought into Louisiana where they are manufac-

[1] See p. 15, *infra*, for discussion.

tured, fabricated and assembled into a finished product for use solely by the purchaser and not held or offered for resale the use tax is not applicable to the finished items. The purchaser should pay the use tax on the cost price of the supply items when they are brought into the state.

See ¶ 60-101a.

[*Questions submitted by CCH*]

We should appreciate being advised whether the use tax applies in the following two situations:

1. Where supply items are purchased at retail in Louisiana and are manufactured, fabricated and assembled in Louisiana into a finished product for use solely by the purchaser and are not held or offered for resale;

2. Where supply items are purchased at retail outside Louisiana and are brought into Louisiana where they are manufactured, fabricated and assembled into a finished product for use solely by the purchaser and are not held or offered for resale.

If the use tax does apply to such finished items, are direct labor and overhead charges deductible in arriving at the cost basis of the items?

[*Answer*]

Please be advised that use taxes are not applicable to finished items in either of the situations outlined by you. In the first situation the purchaser should pay sales tax on the sales price of the supply items when purchased. In the second situation the purchaser should pay use tax on the cost price of the supply items when they are brought into this state.